**No. 84259**

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**IN THE**
**MISSOURI SUPREME COURT**

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**DANNY R. WOLFE,**

**Appellant,**

**v.**

**STATE OF MISSOURI,**

**Respondent.**

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**Appeal from the Circuit Court of Camden County, Missouri**
**26th Judicial Circuit, Division 2**
**The Honorable James P. Anderton, Judge**

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# RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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## JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's Rule 29.15 motion, obtained in the Circuit Court of Camden County, the Honorable James Anderton presiding. Appellant sought to vacate convictions of two counts of first-degree murder, §565.020, RSMo 2000, two counts of armed criminal action, §571.015, RSMo 2000, and one count of first-degree robbery, §569.020, RSMo 2000. Because appellant was sentenced to death, this Court has jurisdiction. Art. V, § 3, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Appellant, Danny R. Wolfe, was convicted of two counts of first-degree murder, two counts of armed criminal action, and one count of first-degree robbery. State v. Wolfe, 13 S.W.3d 248, 252 (Mo. banc 2000). He received two death sentences and three terms of life imprisonment. Id. This Court summarized the facts of the crimes in its opinion on direct appeal. Id. at 252-255. This Court affirmed the convictions and sentences, id. at 252.

On June 14, 2000, appellant filed his pro se motion for post-conviction relief (P.L.F.1,17-67).[1] On September 14, 2000, counsel filed an amended motion (P.L.F.3,99-451).

An evidentiary hearing was held over the course of eight days (P.Tr.23,272,520,795,1111,1281,1576,1779). Then, on December 21, 2001, the motion court issued findings of fact and conclusions of law and denied appellant's motion (P.L.F.15,813-935). This appeal followed.

[1] Respondent will cite to the record as follows: trial transcript (T.Tr.), trial exhibits (T.Ex.), direct-appeal legal file and supplemental legal file (L.F.;Supp.L.F.), post-conviction evidentiary hearing (P.Tr.), post-conviction exhibits (P.Ex.), and post-conviction legal file (P.L.F.).

## ARGUMENT

### I. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS RELATED TO LARRY GRAHAM.

Appellant contends that counsel were ineffective for failing to impeach Larry Graham with prior inconsistent statements made to Larry Matthews, Rod Sederwall, Jimmie Mays, and Tammi Miller (App.Br.35). Graham's prior statements indicated that he had last seen the victims at his meat market on Friday, February 21, 1997, one day after the murders.

Appellant also claims prosecutorial misconduct: first, that the prosecutor falsely suggested that Graham had never told the police he had seen the victims on Friday; second, that the prosecutor failed to disclose a police report wherein Graham stated that he could have seen the victims on Wednesday, February 19; and third, that the prosecutor badgered Graham to compel him to change his testimony (App.Br.35).

#### A. Standard Of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." Id. "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Rule 29.15(i).

#### B. Failure to Impeach Graham

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's

representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Appellant must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. If appellant fails to show either deficient performance or prejudice, the court need not address the other component. State v. Allen, 954 S.W.2d 414, 417 (Mo.App. E.D. 1997).

In denying appellant's claim that counsel was ineffective for failing to impeach Graham, the motion court found that, in light of the evidence presented, appellant failed to overcome the presumption that counsel acted reasonably (despite counsel's attempt to understate her performance); that counsel was not ineffective for failing to impeach appellant's own witness; that counsel was not ineffective for failing to present cumulative evidence, and that there was no reasonable probability that impeaching Graham would have affected the outcome of trial (P.L.F.815-817,819,822-824).

At trial, Graham testified that he thought the victims had been in his market Thursday, February 20, the day after the murders (T.Tr.1892,1894). On cross-examination, Graham admitted that it could have been Wednesday, Thursday, or Friday (T.Tr.1896). However, he then changed his answer, said that it could not have been Friday, and said that it could have been Wednesday or Thursday (T.Tr.1896). On redirect, he was asked about prior statements to appellant's investigator and the police, and he denied telling them that he had seen the victims on Friday (T.Tr.1895,1897-1898). He also said, "Huh-uh" when counsel stated that he had never mentioned Wednesday when questioned during the initial investigation (T.Tr.1898).

At the post-conviction evidentiary hearing, Officer Matthews testified that, on February 24, 1997,

Graham had told him that he had last seen the victims on Friday, February 21, at 12:30 p.m. (P.Tr.218). Officer Sederwall testified that, on February 25, Graham had told him that he had seen the victims on Friday at 11:00 a.m. (P.Tr.285). Officers Sederwall and Mays both testified that, on February 28, Graham had told them that he had seen the victims on Thursday at 11:00 a.m. (P.Tr.227-228,243-244). Tammy Miller, appellant's investigator, testified that, on September 2, 1998 (and in several subsequent telephone conversations), Graham had told her that he had seen the victims on Thursday or Friday, but not Wednesday (P.Tr.1084-1085). When asked why she did not impeach Graham with these inconsistent statements, appellant's trial counsel said that Graham's testimony "threw" her and that she "just didn't do it" (P.Tr.1119-1122).

Despite counsel's willingness to admit her ineffectiveness, the motion court did not clearly err in holding that appellant failed to overcome the presumption that counsel made the decision pursuant to a reasonable trial strategy. The record shows that counsel was aware of Graham's prior statements (T.Tr.838,1893-1898;P.Tr.1114-1117), and that counsel considered calling Jimmy Mays (T.Tr.1899), ostensibly to impeach Graham.

Given counsel's knowledge of the facts, counsel's experience as a seasoned capital litigation attorney (P.Tr.1285-1298), and counsel's obvious preparation on the matter, it strains credulity to suggest that counsel was so surprised by Graham's testimony as to be rendered incapable of doing anything in response. In fact, there is a reasonable explanation for counsel's decision not to impeach (and appear to attack) such an important defense witness. Put simply, Graham's unimpeached testimony tended to prove — without much equivocation — that the victims were in his market during business hours on Thursday, several hours after the murders.

Had counsel chosen to impeach Graham, it would have given the impression that the defense was floundering and trying to regain lost ground, and it would have further weakened Graham's testimony by suggesting that his recollection was even more faulty. As the record shows, immediately after the murders, Graham could not recall whether he had last seen the victims on Friday at 12:30 p.m., Friday at 11:00 a.m., or Thursday at 11:00 a.m. Such inability to remember a fact from one day to the next, within such a short timeframe, and in such close proximity to the actual event, would have indicated that Graham simply did not remember when he had last seen the victims. Accordingly, appellant failed to overcome the presumption that counsel acted reasonably, i.e., that counsel recognized the relative strength of Graham's testimony and strategically chose not to impeach him.

By the same token, appellant was not prejudiced by counsel's decision not to attack Graham. In addition, another defense witness, Robert Morgan, testified that he had last spoken with and seen Leonard Walters on Thursday (T.Tr.1878,1889-1890). Thus, this aspect of appellant's defense was not solely dependent upon Graham.

In short, Graham's testimony was straightforward and credible: although it could have been Wednesday, he believed he had seen the victims on Thursday (T.Tr.1892,1894,1896-1897). In addition, it was suggested that Graham had never said Wednesday during the initial investigation (T.Tr.1898). Thus, given the relative strength of Graham's testimony, there is no reasonable probability that highlighting his faulty memory would have affected the outcome of appellant's trial.[2]

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[2] In arguing prejudice, appellant points out that the jury requested to see T.Ex.A (App.Br.35-36,39-40,43-44,46-47); however, T.Ex.A merely recounted (consistent with his trial testimony) that

### C. Alleged Prosecutorial Misconduct

Appellant also claims that the prosecutor engaged in misconduct with regard to Graham. In analyzing prosecutorial misconduct, the test is not whether the prosecutor acted in bad faith; rather, the test is whether appellant received a fair trial. State v. Williams, 922 S.W.2d 845, 851 (Mo.App. E.D. 1996).

#### 1. The "speculation" objection

During Graham's testimony, the prosecutor objected, in pertinent part, as follows:

Q. Right. But do you remember what day you told the officers during your first interview that you had seen the Walters?

A. No, I do not.

Q. Is it possible that you told them Friday?

A. No, ma'am.

[PROSECUTOR]: I object to that. It's calling for speculation.

(T.Tr.1895). Appellant claims the "speculation" objection misled the jurors by suggesting that Graham had never told the police Friday.

This Court should not review this claim. Claims of trial-court error are only considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances. State v. Carter, 955 S.W.2d 548, 555 (Mo. banc 1997). Here, movant failed to allege any rare or exceptional circumstances.

At trial, counsel knew Graham had previously told law enforcement that he had seen the Walters

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Graham had told police that he thought he had seen the victims on Thursday (P.Ex.KK).

on Friday (T.Tr.1895,1897-1898;P.Exs.II,JJ). Accordingly, appellant could have raised this claim on direct appeal. The mere failure to raise this claim earlier does not bring it within the ambit of Rule 29.15. Id.

In any event, there was no error. In denying this claim, the motion court stated that the prosecutor did not commit misconduct because his objection was to the form of the question (P.L.F.823). The record shows that the prosecutor's objection was directed to defense counsel's use of the word "possible;" thus, there was no misconduct (and no need to consider whether appellant's case was somehow damaged). Had counsel wanted to rephrase the question and impeach Graham, counsel was free to do so; however, counsel reasonably chose not to follow that course, and it was not the prosecutor's responsibility to "correct" a defense witness. And, in light of Instruction No. 2, which instructed the jurors to draw no inference from objections (Supp.L.F.4), there is no reasonable probability that the jury drew any conclusion from the objection. See State v. Madison, 997 S.W.2d 16, 21 (Mo. banc 1999) (jury presumed to follow instructions).

**2. Failure to disclose Sederwall's supplemental report**

On November 16, 1998, after testifying at appellant's trial, Officer Sederwall re-interviewed Graham (P.Ex.LL;T.Tr.815,848). At that time, Graham said he could have seen the victims on Wednesday, Thursday, or Friday (P.Ex.LL). Neither Sederwall's report nor the information contained therein was disclosed to the defense (P.Tr.1120-1121).

Appellant claims that failing to disclose Sederwall's report was a violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), and Rule 25.03(A) (App.Br.45). In denying this claim, the motion court stated that Graham was not a state's witness, and that the report contained neither exculpatory nor impeachment

evidence (P.L.F.824-825).

Because Graham was not subpoenaed by the state, this report was not discoverable under Rule 25.03(A). See Rule 25.03(A)(1) (requiring state to disclose a summary of the testimony of witnesses it "intends to call" at trial). Accordingly, the only question is whether Brady mandated disclosure.

"Prosecutors must disclose, even without a request, exculpatory evidence, including evidence that may be used to impeach a government witness." State v. Robinson, 835 S.W.2d 303, 306 (Mo. banc 1992). The prosecutor must disclose such evidence when it is "material," i.e., when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Strickler v. Greene, 527 U.S. 263, 280 (1999).

In appellant's case, the information in Sederwall's supplemental report neither exculpated appellant nor impeached a state's witness. Accordingly, Brady did not require disclosure. Additionally, non-disclosure was not prejudicial. Appellant claims he was prejudiced because the jurors were not informed that Graham had initially told the police Thursday or Friday, while only mentioning Wednesday at trial (App.Br.45). However, it was not the prosecutor's failure to disclose that left that impression. Had counsel wanted to impeach Graham, counsel could have used Graham's inconsistent statements to Matthews, Sederwall, Mays, and Miller to show that Graham had always said Thursday or Friday (and not Wednesday). But, as discussed above, counsel reasonably chose not to.

### 3. Alleged badgering of witnesses

Finally, appellant claims that the prosecutor badgered Graham to confuse him and compel him to testify favorably for the state (App.Br.46). In denying this claim, the motion court stated that appellant presented no evidence to support this claim, and that the claim was refuted by the record (P.L.F.825).

Appellant admits that he failed to present evidence of badgering; nevertheless, he insists that the repeated interviews of Graham show a pattern of misconduct (App.Br.46-47). He urges this Court, therefore, to disregard the motion court's factual finding. This Court should decline. See State v. Middleton, 80 S.W.3d 799, 805-806 (Mo. banc 2002) ("Given the paucity of supporting evidence, the motion court did not clearly err in concluding there was no [undisclosed] deal.").

## II. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING THE CLAIMS RELATED TO JESSICA COX'S HAIR.

Appellant contends that the state violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose Cox's hair samples (App.Br.48). Appellant further claims that counsel were ineffective for failing to compare Cox's hair samples with a hair found in the ammunition box from the dumpster behind appellant's motel room and a hair found in the backseat of the victims' Cadillac (App.Br.48).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. The Alleged Discovery Violation

Before trial, the state seized samples of Cox's hair (P.Ex.Rx8). The "evidence form" listing the hair samples was apparently not disclosed (T.Tr.208;P.Tr.1127). Appellant now claims a discovery violation.

In denying this claim, the motion court found that counsel's discovery request was satisfied because she was concerned about testing results in the state's possession; that, as a matter of trial strategy, counsel would not have tested the samples if they had been disclosed; that counsel could have tested Cox's hair without the state's disclosing its samples; that the samples were not exculpatory (and would not have altered the outcome of the trial); and that counsel ably dealt with the hair evidence at trial (P.L.F. 858-859).

Prior to trial, Cox testified in a deposition that law enforcement had taken samples of her hair (P.Ex.Hx6 at 297-298). Upon learning this, counsel filed a motion to compel disclosure of the samples (L.F.405-408).

At a hearing on that motion, counsel stated that they had received no "reports as to the taking of

those samples or any results if those were sent to the lab" (T.Tr.208). The prosecutor responded: "I'm not too sure if Ms. Cox had her hair and blood taken, but if it was taken, there was no report generated, so there's no report to turn over" (T.Tr.210). Thus, while the prosecutor did not know whether hair had been seized, the prosecutor assured counsel that no reports had been generated (i.e., no testing had been done).

Defense counsel responded: "If the State is indicating that she is either in error about giving samples of her hair, blood and fingerprints or no reports were generated, that's fine" (T.Tr.213). Thus, counsel was satisfied with the state's response, so long as no test results were being withheld.

And, of course, no test results were withheld; rather, as outlined above, the state failed to disclose that samples had been taken. The fact that hair had been taken — and the hair itself — was not exculpatory and it did not tend to impeach any state's witness; consequently, the state's failure to disclose the fact that hair had been seized was not a Brady violation. See generally Strickler v. Greene, 527 U.S. 263, 280 (1999).

In addition, it is of no consequence that post-conviction testing determined that the samples matched hairs found in the dumpster and Cadillac. That fact was not withheld by the state, and the state's failure to disclose Cox's samples in no way restricted the defense from pursuing that line of investigation. Counsel knew about Cox, and, presumably, counsel knew that she had hair. In other words, because Cox's hair was fungible, it was irrelevant that the state had samples in an evidence room in Camden County. In short, unlike the cases appellant cites, e.g. Hoffman v. State, 800 So.2d 174, 179 (Fla. 2001) (failure to disclose hair-analysis report), the state's failure to disclose the samples did not conceal any pertinent fact or avenue of investigation.

In sum, defense counsel's discovery request was satisfied when the state indicated that it had no

testing results. Had counsel been interested in testing Cox's hair (and the motion court did not credit counsel's post-conviction testimony that she would have had the hair tested), she could have done so, notwithstanding the state's failing to disclose that some of Cox's hair was sitting in an evidence room.

### C. Counsel was not Ineffective

In the alternative, appellant argues that counsel was ineffective for failing to discover the hair and have it tested (App.Br.53). In denying this claim, the motion court stated that counsel would not have tested the hair if it had been disclosed (as a matter of trial strategy), that the expert's testimony was not persuasive due to the limited scientific foundation it was based on, and that the hair would have largely corroborated Cox's story (P.L.F.857-859).

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

#### 1. Counsel acted reasonably

Appellant claims that counsel should have discovered the samples that the state collected (App.Br.53). He focuses on the allegedly beneficial testing that could have been performed if the samples had been obtained; however, he overlooks the fact that counsel made reasonable efforts to obtain the samples.

When counsel learned (at the deposition) that the police had collected samples, counsel immediately filed a motion to compel disclosure (L.F.405-408;P.Ex.49). Then, at the hearing on the motion to, counsel was essentially told that the state did not know of any samples (T.Tr.210). Thus, counsel proceeded to

trial with the belief that the samples had never been taken (P.Tr.1126-1127).[3]

Under such circumstances, it cannot be said that counsel's actions fell below "an objective standard of reasonableness." To the contrary, counsel took every reasonable step at her disposal to determine whether the state was holding samples of Cox's hair.

The real question, therefore (and it is not a question raised by the claim appellant asserts), is whether counsel was ineffective for failing to obtain hair samples from Jessica Cox, and whether counsel would have actually tested the samples.

As stated above, the trial court did not credit counsel's post-conviction testimony that she would have tested Cox's hair if she had obtained it (P.L.F.859). That conclusion was not clearly erroneous. As discussed above, counsel knew about Cox prior to trial, and counsel knew that Cox had hair; yet counsel chose not to obtain samples from Cox for independent testing (P.Tr.1484). Accordingly, her post-conviction testimony is belied by the evidence of her pre-trial actions.

Moreover, counsel's post-conviction testimony that she would have tested the hair was qualified testimony. When initially asked if she would have wanted to do the testing, counsel said "yes" (P.Tr.1127-1128). However, on cross-examination, she admitted that prior to trial, she would have merely wanted the "option" to do the testing, and that she would have "thought about it very hard" (P.Tr.1420-1421). It was only when asked under the assumption that testing would have revealed a match with the hair in the Cadillac and dumpster that counsel stated that she would have tested the hair (P.Tr.1421-1422).

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[3] Counsel had looked through the evidence two or three times and never saw anything about the samples (P.Tr.1127;T.Tr.208).

Thus, the record of her pre-trial actions (where, as discussed above, she did have the option of obtaining Cox's hair for testing) and her equivocal post-conviction testimony (which, with classic perfect hindsight, revealed that she would have wanted to test the hair only if it would have helped her case) shows that counsel had no intention of actually testing the hair, and that counsel was only concerned with turning up any testing results that the state might have been withholding.

Furthermore, counsel admitted that evidence that the samples matched the hair in the Cadillac and dumpster could have been used by either the state or the defense (P.Tr.1422-1423). Thus, the benefit of testing the hair was minimal. Also, counsel admitted that she did not want the state to test appellant's hair (P.Tr.1485). However, requesting hair samples and testing of Cox's hair could have renewed the state's interest in obtaining and testing appellant's hair. That fear may seem unfounded now, in light of post-conviction testing; however, prior to trial, counsel had to weigh and balance potential risks without the benefit of hindsight. In short, with regard to obtaining the hair samples, it cannot be said that counsel's actions fell below an objective standard of reasonableness.

**2. Appellant was not prejudiced**

Finally, even if counsel should have obtained the hair samples and tested them, appellant was not prejudiced. At the evidentiary hearing, Donald Smith testified that he compared Cox's hair samples with the hairs found in the dumpster and the Cadillac (P.Tr.981-982). He testified that it was highly probable that the hair from the dumpster (found in an ammunition box) came from Cox (P.Tr.989). He also testified that the hair from the Cadillac came from Cox (P.Tr.995). The motion court found the testimony unpersuasive due to an inadequate number of hairs for comparison (P.Tr.857).

The court's evaluation of the persuasiveness of the purported expert's testimony is significant,

because the relevant question in determining prejudice is whether there is a reasonable probability that the testimony would have affected the outcome of appellant's trial. Here, the motion court discounted the expert's testimony not simply because the court thought he was lying, but because the scientific basis for his opinion was lacking. For instance, the expert seemingly improvised his testimony regarding the hair that was found in the Cadillac because there was nothing about it in his report (P.Tr.1001-1002). Also, the expert admitted he had far fewer hairs to compare than that recommended by experts in the field (P.Tr.1003-1004). And finally, the expert acknowledged that two different people can have similar hair, but he disagreed with an accepted scientific text that admonished

> that the limits of human hair comparison should be explained to the jury, and that even though the questioned hairs may be similar in all respects to a person's hair and dissimilar to most other hair, the forensic examiner can never say with certainty that there may not be another individual who possesses similar hair.

(P.Tr.1009-1010).

In light of the limited scientific basis for his conclusions, the motion court found that his testimony was not persuasive. Accordingly, there is every reason to believe that if the jury had conscientiously considered this evidence — which it is presumed to do — the jury also would not have been persuaded.

And, finally, even if the infirmity of this evidence is overlooked, there is no reasonable probability that it would have altered the outcome of appellant's trial. At trial, Cox testified that she spent a considerable amount of time with appellant in his truck and hotel room before accompanying him to the victims' home. She played pool with him, talked with him while sitting at the bar, went to his hotel room (more than once), rode from place to place in his truck, and, after several hours, traveled to the victims'

home (T.Tr.1095-1096,1100-1103,1107-1108,1111-1124). She also testified that she was in the Cadillac with appellant and Leonard Walters (T.Tr.1133-1142).

Accordingly, evidence confirming her presence at appellant's hotel room and in the Cadillac would have largely corroborated her story. The fact that the hairs were found in the ammunition box and in the backseat area of the Cadillac is of little consequence. Cox spent a considerable amount of time in close proximity to appellant, and it is reasonably probable that some of her hairs were simply transferred to appellant's clothing, shoes or other belongings. It is also reasonably probable that Cox's involvement was less sterile than her trial testimony indicated, i.e., that Cox minimized her actions and omitted certain, perhaps personally embarrassing, entanglements between her and appellant.

It is not reasonably probable, however, that the presence of Cox's hair would have convinced the jury that appellant was not involved in the murders. His involvement was established by Cox's eyewitness testimony, his confession to Paul Hileman, and other circumstantial evidence of guilt. Thus, while the presence of Cox's hair could have conceivably undermined certain aspects of her testimony, there is no reasonable probability that it would have altered the verdict.

## III. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS RELATED TO PAUL HILEMAN.

Appellant contends that counsel was ineffective for failing to investigate and impeach Paul Hileman on various matters (App.Br.54). Appellant also contends that the prosecutor committed misconduct by failing to disclose impeaching information, improperly objecting, and using an unreliable witness (App.Br.54). Finally, appellant claims that his conviction and sentence is unreliable due to Hileman's lies and mental illness (App.Br.54).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Alleged Failure to Disclose Evidence of Hileman's Mental Illness

Appellant first argues that Hileman was incompetent, and that the prosecutor violated United States v. Bagley, 473 U.S. 667, 674-677 (1985), and Brady v. Maryland, 373 U.S. 83, 86-89 (1963), in failing to disclose Hileman's incompetence (App.Br.58-59). In denying this claim, the motion court found that appellant's claim that Hileman was not competent was refuted by the record, that counsel's investigation of Hileman was adequate, that appellant failed to prove his claim, and that Hileman could not have been impeached with the records appellant presented at the evidentiary hearing (P.L.F.846-847).

Although he failed to specifically allege what records the prosecutor failed to disclose, appellant now argues that the prosecutor failed to disclose records from the Missouri Department of Corrections and

a mental health facility in Independence, Iowa (App.Br.58-59).[4] He claims the prosecutor knew Hileman had "mental problems" because, according to appellant's interpretation, the prosecutor "told the trial court that counsel was using [Hileman's] pretrial letters to show [Hileman] was crazy" (App.Br.59,citing T.Tr.1554).

In fact, the prosecutor had no knowledge of Hileman's alleged incompetence. When discussing counsel's use of Hileman's pretrial letters, the prosecutor stated: "It's pure and simply a collateral matter that [counsel] intends to construct or attempt to construct this elaborate theory that Paul Hileman is — I don't know what — crazy" (T.Tr.1554). Read in context, the prosecutor did not believe Hileman was "crazy" (T.Tr.1554).[5] In fact, nothing in Hileman's pre-trial letters showed incompetence; and, in any event, they were disclosed.

With regard to mental health records from the Missouri Department of Corrections, there was

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[4] The Independence records were not admitted into evidence; they were attached to a motion to re-open the evidence after the court had issued its findings (P.L.F.938,1199). The motion was denied; the records should not be considered (P.Tr.1819-1820). Ironically, post-conviction counsel obtained Hileman's records by having Hileman sign a medical release form (P.Tr.1818). Apparently, Hileman was competent to do that.

[5] The prosecutor undoubtedly used the word "crazy" because, in the pretrial letters, Hileman had also used the word "crazy," e.g., calling himself "Crazy Man," and in describing some incriminating letters he had written to a witness whom he was charged with threatening (T.Tr.1565,1571). These were obviously lay references that would not trigger any official belief or suspicion that Hileman was, in fact, "crazy."

nothing to indicate that Hileman was incompetent. To the contrary, an "Intake Mental Health Screening" filled out in 1998 revealed no suicide risk, no psychiatric history, no pyschotropic medication or treatment, no suicidal ideation, no suicide plan or suicide instrument in his possession, no previous suicide attempts, no feelings of helplessness or hopelessness, no signs of depression, no strange actions or expressions, and no signs of mental illness (P.Ex.B). Two "Suicide Intervention Reports" from 1996 were included in his records; however, both reports indicated that Hileman was oriented, coherent, not suicidal, not homicidal, not assaultive, and not delusional or experiencing hallucinations (P.Ex.B). The remaining "Psychological Evaluation Referral" forms merely recited some previous drug use and antisocial characteristics (noted in 1993); and depression due to a conduct violation, difficulty sleeping, frustration over delay in obtaining a transfer, and "thought confusion" due to his extended time alone (noted in 1991)(P.Ex.B).

None of the records actually indicated any mental disease or defect affecting Hileman's ability to testify; rather, the records indicated that, while Hileman was suffering from symptoms common among inmates (P.Tr.579), he was consistently oriented and coherent, and not suicial, homicidal, or delusional. And, significantly, no expert testified that, on the basis of these records, Hileman was incompetent to testify in November 1998. In short, the prosecutor did not fail to disclose any "material" information that could have been used to impeach. See generally Strickler v. Greene, 527 U.S. 263, 280 (1999) (evidence must be "material").

And finally, with regard to the mental health records from a treatment facility in Independence, Iowa, there is nothing for this Court to consider because they were not admitted into evidence (P.Tr.1819-1820). In any event, even if the Independence records are considered, they were not known to the prosecutor prior to trial, and the prosecutor had no duty to obtain them and disclose them to the defense.

Citing State v. Robinson, 835 S.W.2d 303, 306-307 (Mo. banc 1992), appellant argues that the prosecutor had a duty to seek out the Independence records and disclose them to the defense (App.Br.58). Robinson does not support such a broad claim. In Robinson, in concluding that circuit courts lack authority to order mental evaluations of state's witnesses, this Court reiterated that a prosecutor must disclose "exculpatory evidence, including evidence that may be used to impeach a government witness." Id. at 306. This Court also noted, in dicta, that allowing a prosecutor to evade the duty to disclose by simply failing to gain "possession" of a medical record "fails to recognize the nature of the prosecutor's role in the system." Id. This Court did not hold that the prosecutor must disclose all extant records wherever they might be in the world. To the contrary, this Court contemplated that prosecutors would only have to disclose records that are either known to them personally or held by the "law enforcement community" in Missouri. See id.; see also Kyles v. Whitley, 514 U.S. 419, 437-440 (1995) ("prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case").

In the case at bar, the records from Independence, Iowa, were neither known to the prosecutor nor held by the law enforcement community in Missouri. Additionally, there was never any pretrial indication of incompetence: Hileman testified rationally at two depositions (P.Ex.RRR,SSS), and there was no evidence of any prior mental illness. And, lacking reasonable cause to believe that Hileman was incompetent, there was no duty upon the prosecutor to investigate or "disclose" Hileman's alleged incompetence. Cf. Woods v. State, 994 S.W.2d 32, 37 (Mo.App. W.D. 1999) (holding that a judge must order a §552.020 evaluation once the judge has "reasonable cause" to believe that a defendant is incompetent).

In short, the prosecutor did not fail to disclose any material information known to the prosecutor

or held by law enforcement that could have been used to impeach Hileman. Moreover, the prosecutor had no duty to assume Hileman's incompetence (contrary to the statutory presumption of competence), and the prosecutor had no duty to conduct a nationwide (or worldwide) investigation to turn up records that might have been extant at the time of trial. Had defense counsel believed that Hileman was incompetent, counsel could have investigated and filed a motion alleging incompetence. See State v. Robinson, 835 S.W.2d at 307. Whether counsel was ineffective for failing to do so is appellant's next claim.

### C. Counsel was not Ineffective

#### 1. Hileman's alleged incompetence

Appellant contends that counsel was ineffective for failing to investigate Hileman's competence (App.Br.59-60). In denying this claim, in addition to the findings outlined above, the motion court found that the post-trial evidence of incompetence was not available to counsel, that the post-trial evidence of Hileman's incompetence was questionable, and that appellant failed to prove his claims (P.L.F.843-846,849).

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

Appellant presented post-trial letters written by Hileman, various post-trial records, and the testimony of various experts who testified that Hileman suffered from various mental infirmities, including delusional disorder, psychotic disorder not otherwise specified, adjustment disorder, mixed personality disorder with paranoid and antisocial features, and paranoid schizophrenia (P.Tr.568;

P.Exs.C,E,F,G,Tx4).[6] Dr. Daniel and Dr. Nnanji testified that Hileman suffered from one or more of these mental infirmities at the time of trial (P.Tr.568; P.Ex.G at 47-48).

However, because all of this evidence was produced after trial, none of it was available to counsel; hence, counsel cannot be faulted for failing to uncover it during her investigation. Appellant now asserts, however, that "[a]ll the signs were there, counsel simply failed to look" (App.Br.60). The "signs," appellant claims, were in Hileman's pretrial letters and Hileman's prison records (App.Br.59). However, neither Hileman's pretrial letters nor his prison records revealed any reasonable cause to believe that Hileman was "crazy" as appellant asserts. To the contrary, Hileman's pretrial letters, while not always happy or pleasant, were not "bizarre;" and the prison records, while revealing symptoms common in inmates, revealed that Hileman had no serious mental health problems. See Lyons v State, 39 S.W.3d 32, 37-38 (Mo. banc 2001) (counsel not ineffective in failing to obtain neuropsychological testing when other report showed "no evidence of brain damage").

Additionally, counsel deposed Hileman twice, and Hileman never indicated any lack of understanding or incompetence (P.Tr.752). He was coherent, and responded appropriately to all questions (P.Tr.752-753;P.Exs.RRR,SSS). In light of the circumstances as they existed before trial, counsel's investigation was reasonable.

In addition, counsel's failing to investigate Hileman's competence did not prejudice appellant. Had

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[6] One of appellant's purported experts, an unlicensed "mental health therapist," was not qualified to offer an opinion regarding Hileman's alleged mental illness (P.Ex.E at 34-35). See Johnson v. State, 58 S.W.3d 496, 499 (Mo. banc 2001).

counsel called an expert, that expert only could have considered pretrial manifestations of the alleged incompetence in evaluating Hileman. However, there was no evidence that the available pretrial records would have supported a diagnosis similar to the post-trial diagnoses. Thus, even assuming that appellant could have found an expert to offer such testimony, there is no reasonable probability that such weak evidence of mental illness would have altered the outcome of appellant's trial.

**2. Hileman's lies**

Appellant also contends that counsel was ineffective for failing to investigate and present evidence of Hileman's lies (App.Br.60-65). Specifically, appellant claims that counsel was ineffective for failing to investigate and/or present statements from Hileman's letters and records, and the testimony of John Hawk, David Murdock, Keith Eichinger, George Failing, and Thomas Breen (App.Br.60-65). In denying these claims, in addition to the findings outlined above, the motion court stated that counsel conducted a reasonable investigation, that Murdock could not be found prior to trial, that Murdock's testimony corroborated Hileman and impeached Dayton (a defense witness), that John Hawk could not be found prior to trial, that Eichinger had no substantive evidence to offer, that Failing's testimony was not admissible to impeach Hileman on collateral matters, that Breen had no substantive evidence to offer, that Hileman could not have been impeached with post-trial materials, that Hileman was adequately impeached at trial, that Hileman could not have been impeached with various bad acts or other collateral matters, and that appellant failed to prove prejudice (P.L.F.847-851).

With regard to counsel's investigation, it cannot be said that counsel's efforts fell below an objective standard of reasonableness. Counsel deposed Hileman twice, reviewed Hileman's pretrial letters, and investigated numerous people in preparing to attack Hileman's credibility (P.Exs.RRR,SSS;T.Tr.1600-

1610). At trial, in addition to directly impeaching Hileman with numerous pretrial lies, his hope of favorable treatment in pending cases, his alleged willingness to do anything to get out jail, and his prior convictions (T.Tr.1553-1583,1594-1596,1598), counsel was prepared to elicit additional impeachment evidence through Tracy Dusenberry, George Failing, Willey Keith, Keith Eichigner, Thomas Breen, and Phillip Dayton (T.Tr.1600-1610). The only reason Failing, Keith, Eichinger, and Breen did not testify was because Hileman had already admitted to making the various statements of which they had knowledge (T.Tr.1600-1610). Thus, in light of counsel's extensive efforts to investigate and prepare for the assault upon Hileman's credibility, it cannot be said that counsel's performance was unreasonable.

Ignoring counsel's extensive efforts, appellant claims that counsel should have investigated John Hawk and David Murdock, two of Hileman's cellmates in the Camden County Jail (App.Br.60). However, appellant overlooks the fact that counsel investigated and interviewed James Dodd, one of Hileman's cellmates, and attempted to find both Hawk and Murdock (P.Tr.605-607,613-614). Accordingly, appellant failed to prove that counsel's efforts were unreasonable.

In any event, there is no reasonable probability that Murdock or Hawk's testimony would have altered the outcome of appellant's trial. Murdock testified that Hileman was worried about his pending charges and that he lied about who was bringing drugs into the jail in an attempt to work out a deal for a shorter prison sentence (P.Ex.J);[7] Hawk testified (very unconvincingly) that although he could not

[7] Appellant did not plead in his amended motion that Murdock would testify that Hileman said he could not handle forty years, and that Hileman asked him to write letters and testify that jailers had brought the drugs into the jail; thus, these factual assertions in appellant's brief should be ignored.

remember what Hileman had said, he thought Hileman intended to fabricate something against appellant to work out a deal for a shorter prison sentence (P.Ex.I).[8] Such testimony was simply additional, cumulative testimony that Hileman had told lies and was willing to falsely implicate appellant to get out of jail.

At trial, Hileman admitted that he had lied about an officer bringing drugs into the Camden County Jail (T.Tr.1566-1567). He also admitted that he had written a letter about this incident wherein he stated "I'm doing this solely to help get my a-- out of here," "I want to beat this stuff," and "I will, you mark these words" (T.Tr.1565). In addition, with much greater clarity than Hawk, Tracy Dusenberry testified that Hileman had told her that "he was going to make a deal and state that [appellant] confessed to him" (T.Tr.1614). She also elaborated that Hileman had "swor[n her] to secrecy because if [she] said anything, it would screw up his deal with the state" (T.Tr.1614-1615). Similarly, Phillip Dayton testified that Hileman, who was worried about his non-parolable pending charge, had tried to convince Dayton to tell law enforcement that appellant had confessed to them (T.Tr.1622-1623). And, in addition to providing nothing new, Murdock's testimony corroborated Hileman's trial testimony and contradicted Dayton's trial testimony regarding who had brought the drugs into the jail (T.Tr.1581,1623-1624;P.Ex.J). There is no reasonable probability that Murdock or Hawk's testimony would have altered the outcome of appellant's trial.

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[8] Appellant did not plead in his amended motion that Hawk would testify that Hileman worried especially about the tampering charge and his status as a "three-time loser," and that Hileman said he was "going to get some dirt" on appellant; thus, these factual assertions in appellant's brief should be ignored.

With regard to Eichinger,[9] Failing,[10] and Breen,[11] appellant failed to show that counsel was ineffective. Counsel was prepared to call them at trial; however, as outlined above, they were not allowed to testify as impeachment witnesses because Hileman had already admitted to making the various statements of which they had knowledge (T.Tr.1553-1583,1594-1596,1598,1600-1610). Counsel diligently tried to present their testimony (T.Tr.1600-1610).

In any event, even assuming that counsel was not sufficiently diligent, appellant was not prejudiced because virtually every piece of information alleged in the amended motion was actually adduced at trial. And if some particular fact was not actually adduced from one of these witnesses, it was easily inferred from the facts that were adduced.

At trial, Hileman admitted that he wrote various letters containing allegations about drugs in the

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[9] Appellant did not allege in his amended motion that Eichinger would testify that Hileman was always making unfounded allegations against others; thus, this factual assertion should be ignored.

[10] Appellant did not allege in his amended motion that Failing would testify that Hileman said he wanted probation; that Hileman said "if I could just 'somehow' convince Icenogle that I'm worth the chance;" that Hileman sent letters with drugs, failed a urine test, and admitted to getting high in jail; and that Hileman once got upset over a transfer delay and swung at an officer; thus, these factual assertions should be ignored.

[11] Appellant did not allege in his amended motion that Breen would testify that various witnesses refuted Hileman's claims, that Hileman gave contradictory statements, that Hileman was using any method he could to avoid his pending charges, and that the polygraph examination was only cancelled *after* Hileman agreed to testify against appellant; thus, these factual assertions should be ignored.

Camden County Jail, that he also sent marijuana out with some of his letters, that he told Failing that he had used marijuana in jail and would probably have a "dirty urine" when his urine sample was tested, that he told Dusenberry that he was sending the marijuana letters "solely to help get my a-- out of here," that he falsely told Breen that an officer was bringing the drugs into the jail, that he told Breen he would take a polygraph examination but ultimately was not examined, that he later told Eichinger that Dayton was bringing the drugs into the jail, and that he told Failing that he would rather be in prison than in jail (T.Tr.1556-1567). In addition, as discussed above, counsel also presented the testimony of Dusenberry and Dayton, who confirmed that Hileman intended to falsely implicate appellant to obtain a shorter sentence (T.Tr.1614-1615,1622-1623).

Finally, appellant claims counsel was ineffective for failing to use various letters and records to impeach Hileman (App.Br.63-65). First, he argues that Hileman's testimony that he was placed in solitary confinement and transferred from one prison to another should have been impeached with evidence of the allegedly real reasons for his confinement and transfers, to wit, "because he lied, was a troublemaker and because he was bisexual" (App.Br.63).[12] Appellant cites P.Exs.E,C, and Qx5 to support this claim; however, none of these records indicate that Hileman was put in solitary confinement or transferred before trial due to lying, troublemaking, or bisexuality. In addition, two of these records, Exs.E and C, were not in existence at the time of trial; thus, they were not available for impeachment.

Second, appellant points out that Hileman once wrote, in an undated letter, about a trick played

[12] Appellant did not allege in his amended motion that Hileman should have been impeached with his bisexuality; thus, this factual assertion should be ignored.

on another inmate (P.Ex.Ux4), that Hileman admitted to lying about his stories, and that Hileman said he would "do anything and everything not be convicted" (P.Ex.C). The "trick" letter, however, was not dated; thus, there is no evidence that it was available to counsel before trial. Additionally, it showed nothing more than a practical joke. Hileman's admissions in P.Ex.C were nothing new (he admitted at trial that he had lied), and, in any event, that record did not exist until more than a year after trial.

Third, appellant argues that Hileman should have been impeached with threatening letters he wrote to Cassandra Martin; however, he admitted at trial that he had written threatening letters to Martin, and that he was, at the time of trial, charged with tampering with a witness (T.Tr.1556-1557). Thus, there was no proper basis or need to further impeach him with the specific threats he had made.

Fourth, citing P.Ex.Xx4, appellant implies that Hileman should have been impeached with the fact that he allegedly threatened another state's witness, Amanda Lister (App.Br.65). P.Ex.Xx4, however, was never admitted at the evidentiary hearing, and it is not part of the record on appeal. It should, therefore, be ignored. In addition, the amended motion did not assert that counsel should have impeached Hileman with this misconduct; thus, this claim should be ignored. In any event, to the extent that Ex.Xx4, purports to show that Hileman, at some point in time, allegedly threatened Amanda Lister, it was not proper impeachment evidence. "A witness' credibility may not be impeached with evidence of a mere arrest, investigation, or criminal charge, not resulting in a conviction." State v. Wolfe, 13 S.W.3d 248, 258 (Mo. banc 2000). A witness cannot be impeached by proof of a bad reputation for morality or proof of any specific act indicating moral degeneration. Id. "[S]pecific acts of misconduct, without proof of bias or relevance, are collateral, with no probative value." Id.

This rule would have barred most, if not all, of the evidence that appellant alleges counsel should

have elicited. "The impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity." Id. Thus, even if counsel had additional information that indicated that Hileman was a moral degenerate, it was not generally admissible to impeach his trial testimony.

### D. The Other Alleged Brady Violations

Appellant also claims that the prosecutor failed to disclose (1) a deal for Hileman's testimony, (2) Hileman's prior conviction in Illinois, and (3) Hileman's Missouri prison records (App.Br.65-70). In denying these claims, in addition to the findings outlined above, the motion court found that there was no evidence that Hileman had a deal, that Hileman's pending charges were revealed to the jury, and that the prosecutor's failing to disclose the Illinois conviction was not prejudicial (P.L.F.850-851).

Prior to trial, three of Hileman's attorneys testified that they did not know of any deal (T.Tr.86-90,112-113; P.Exs.Ux6,Vx6). At trial, Hileman testified about his previous guilty plea on one charge, his one dismissed charge, and his pending charges (including the fact that the trial date for his pending charges had been moved to December 1, 1998, after appellant's trial). He testified that he had no deal (T.Tr.1556,1560,1568-1569,1576,1587).

At the evidentiary hearing, appellant introduced a docket sheet allegedly from one of Hileman's cases which indicated that there had been plea negotiations (P.Ex.Gx8). However, the case number on that docket sheet (97-4480) did not match any of the cases Hileman had pending during trial (97-4039, 97-4483, and 97-4484); and, in fact, the prosecutor was apparently mistaken when he identified P.Ex.Gx8 as a docket sheet from case no. 97-4039. See P.Ex.Ax8. In any event, Hileman's pending charges were eventually dismissed on July 7, 1999, more than seven months after Hileman testified (P.Ex.Ax8,Bx8,Cx8).

The prosecutor testified, however, that they were not dismissed pursuant to any previously made deal (P.Tr.1655-1662).[13]

Without more than these circumstances — without evidence of a deal to dismiss the pending charges in exchange for Hileman's testimony — the motion court did not clearly err in concluding that there was no undisclosed deal. Middleton v. State, 80 S.W.3d 799, 805-806 (Mo. banc 2002) ("Given the paucity of supporting evidence, the motion court did not clearly err in concluding there was no [undisclosed] deal.").[14]

Appellant insists there was a deal, however, and he cites Icenogle's testimony that he had "told Mr. Hileman at some point that if, as a result of his testimony in this case he had problems in the penitentiary, that [Icenogle] would request that the penitentiary transfer him out of state, something like the witness protection program" (P.Tr.1692). And, in fact, true to his word, Icenogle did request transfers for Hileman

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[13] As further evidence of a deal, appellant attempts to cite an affidavit that was attached to his unsuccessful motion to re-open the evidence. The affidavit was not admitted into evidence, is not competent evidence, and should not be considered. Even if the affidavit were considered, it does not prove that there was any deal for Hileman's testimony; rather, the note it references simply details an expected chronology and outcome in Hileman's pending case. See P.L.F.1206-1207.

[14] Citing P.Ex.A at 90, appellant claims that there was another pending "bad check" charge in Morgan County (App.Br.65-66); however, the letter in Hileman's prison records does not prove that this charge was pending during trial. Moreover, even if it had been pending, it was not relevant because the Camden County prosecutor had nothing to do with its disposition. See State v. Joiner, 823 S.W.2d 50, 53 (Mo.App. E.D. 1991).

(P.Tr.1592,1692-1693; P.Ex.Tx4). This assurance of protection, however, was not a deal or inducement given in exchange for Hileman's testimony; rather, it was merely an assurance (made after Hileman had agreed to testify) that Icenogle would do what he could to protect Hileman's health and safety if Hileman "had problems in the penitentiary" because of his testimony.

The distinction may seem slight, but it makes all the difference in determining whether there was a "deal" that could have been used to impeach Hileman's testimony. This alleged deal did not give Hileman any advantage in his pending cases, and it did not reduce his sentences. The "deal" only sought to assure Hileman, after he had agreed to testify, that he could testify without undue fear.

And even if this assurance was a deal, appellant was not prejudiced by Icenogle's failing to disclose it to the defense. At trial, Hileman testified that he was already the beneficiary of protective measures (T.Tr.1586-1587). Thus, had Hileman been asked whether the prosecutor had assured him of protective measures, there is no reasonable probability that the jury would have been disinclined to believe Hileman's testimony (assuming, of course, that the jurors even credited his testimony in reaching their verdict). To the contrary, rather than undermining Hileman's testimony, such an assurance could have been properly understood by the jury as merely a reasonable safeguard for a state's witness.

Next, appellant claims that the prosecutor violated Brady in failing to disclose one of Hileman's prior convictions from Illinois (App.Br.68). At trial, when Hileman was asked about his prior convictions, he stated (incorrectly) that his Illinois conviction was a juvenile conviction (T.Tr.1577). The prosecutor objected; and in the absence of any evidence to the contrary, the court sustained the prosecutor's objection and ordered Hileman's response stricken (T.Tr.1577-1578). At the evidentiary hearing, the prosecutor acknowledged that he had made an incorrect objection, and he acknowledged that he should have known

that Hileman's Illinois conviction was not a juvenile conviction (P.Tr.1631-1632).

Nevertheless, the state should not be faulted for nondisclosure because defense counsel knew about Hileman's conviction from Illinois. See State v. Calvert, 879 S.W.2d 546, 548 (Mo.App. W.D. 1994) ("the state cannot be faulted for nondisclosure if the defendant had knowledge of the evidence at the time of trial"). In any event, the prosecutor's inadvertent misconduct did not affect the fairness of appellant's trial.

Hileman had already admitted that he had prior convictions, including property damage, burglary (two convictions), stealing (two convictions), forgery (two convictions), and interference with custody (two convictions)(T.Tr.1540-1541). Thus, there is no reasonable probability that, had Hileman testified that he had another conviction, the outcome of the trial would have been different.

Lastly, appellant contends that the state violated Brady by failing to disclose Hileman's prison records (App.Br.69). He claims that Hileman's numerous conduct violations, discipline problems, lies, and attempts to obtain transfers could have been used to impeach him (App.Br.69-70). However, evidence of "misconduct, without proof of bias or relevance, [is] collateral, with no probative value." State v. Wolfe, 13 S.W.3d at 258. Here, contrary to appellant's bare assertion, the records do not show any motivation to testify against appellant or favorably for the state.

And finally, even if these records had some minimal impeachment value, it was not material. See State v. Rousan, 48 S.W.3d 576, 590 (Mo. banc 2001)(disciplinary records of officers were not material impeachment evidence because they did not contain information about the officers' actions with regard to the defendant's case). In short, because Hileman's misconduct was neither admissible nor material, the state had no obligation to disclose it.

### E. Appellant's Convictions and Sentences are Reliable

Appellant claims his convictions and sentences are unreliable due to the many alleged infirmities in Hileman's testimony (App.Br.72-73). However, as discussed in greater detail above, there is no reason to believe that Hileman was incompetent, or that the prosecutor "turn[ed] a blind eye" to Hileman's incompetence. In addition, no doctor had the opportunity to observe Hileman at trial, and the testimony of Dr. Daniel and Dr. Nnanji was based almost entirely upon behavior and records that came into existence long after appellant's trial.

The jury was well apprised of Hileman's various lies, misconduct, prior convictions, attempts to make trouble in jail, and alleged desire to fabricate false testimony against appellant (T.Tr.1556-1567,1614-1615,1622-1623). No material impeachment evidence was withheld (or ignored by the prosecutor) or overlooked. Thus, the reliability of the jury's verdicts, while perhaps subject to personal debate, is not constitutionally questionable.

## IV. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL A PATHOLOGIST TO TESTIFY ABOUT THE TIME OF DEATH.

Appellant contends that counsel was ineffective for failing to call a pathologist to testify that the time of death was after sunrise on Thursday, February 20 (App.Br.75).

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

In denying this claim, the motion court found that counsel was not obligated to shop for another expert who was more favorable than the state's experts, and that appellant was not prejudiced because the testimony presented at the evidentiary hearing was cumulative and corroborated the state's evidence (P.L.F.853-854).

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

At trial, Jay Dix testified that it was possible the victims were killed on Thursday morning, February 20 (T.Tr.1079-1080). He admitted, however, that it was also possible that they were killed on Thursday afternoon, Thursday evening, or Friday (T.Tr.1084-1085). James Jungles, the county coroner, testified that he initially estimated that the victims had died 24-36 hours prior to their discovery, or on Saturday morning or Friday night (T.Tr.993,999-1000,1002-1003,1009). He agreed that the murders could have occurred as far back as Thursday morning, but he discounted that possibility because it was not likely that the victim's body sat in the car for three days unnoticed (T.Tr.991,1013). Thus, with the state's experts giving evidence that supported the defense, counsel was not obligated to shop for a more favorable expert.

See Lyons v. State, 39 S.W.3d 32, 41 (Mo. banc 2001).

At the evidentiary hearing, Thomas Bennett testified that the victims were most probably killed on Friday, February 21, but that it could have been Thursday or Saturday (P.Tr.291). He testified that the most likely date was February 20 or 21, but that he considered February 21 the most probable (P.Tr.293-294). Thus, while February 21 was slightly more probable, February 20 was also within the most probable time frame (P.Tr.293-294). He expressly testified that Thursday morning around sunrise was within the most probable time frame (P.Tr.294,335). He admitted that determining time of death is a "very inexact" science (P.Tr.321), and he did not disagree with Dix's testimony (P.Tr.335-336).

Given the state's evidence at trial, there is no reasonable probability that additional evidence of the same tenor would have altered the outcome of appellant's trial. Indeed, presenting a defense expert who was willing to testify that Thursday morning was within the most probable time frame (and thereby allowing the state to convincingly argue its case based upon the defense expert's testimony) would have been highly deleterious to the defense.

## V. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF JESSICA COX'S LYING AND GREATER INVOLVEMENT IN THE MURDERS.

Appellant contends that counsel was ineffective for failing to investigate and present evidence of Cox's lies and involvement in the murders (App.Br.79). He claims counsel was ineffective for failing to investigate and present the testimony of (1) Kenneth Andrew Tucker, Tammy Lister, and Darren Klein, who would have testified about Cox's misconduct and alleged lies; (2) Suzanne Kelly and Kurt Nichting, who would have testified that Cox had had a gun; (3) Wendy Smith, Joyce Whittle, and Suzanne Kelly, who would have testified about Cox's incriminating statements; and Monica Clark, who would have contradicted Cox's account of appellant's whereabouts (App.Br.80-87,89-90). He also claims counsel was ineffective for failing to impeach Cox with prior inconsistent statements (App.Br.87-88).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Counsel's Investigation and Impeachment of Cox was Reasonable

In denying these various claims, the motion court found that counsel's investigation was effective, that the extent of cross-examination is a matter of trial strategy, that counsel ably cross-examined Cox, that the mere failure to impeach is not ineffective assistance, and that appellant was not prejudiced (P.L.F.825-826,830-831).

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was

deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

Here, counsel was well prepared to cross-examine and impeach Cox and undermine her account (T.Tr.1182-1282). In preparing for trial, counsel deposed Cox and hired an investigator to investigate her background (P.Tr.1124,1314-1316; P.Ex.Gx6,Hx6). Additionally, counsel or her investigator interviewed or deposed Monica Clark, Roger Patterson, Suzanne Kelly, Kenneth Andrew Tucker, Wendy Smith, Tammy Lister, Darren Klein, Allen Fair, Jaelyn Shipman, Richard Kremenak, John Sakaitis, Becky Eaton, Debra Kempf, Mary (Parle) Griffin, Robert Morgan, Linda Lagergren, Larry Graham, Joyce Whittle, Russell Britt, Chris Young, and Cheryl Young[15] (P.Tr.1144-1146,1150-1151,1166,1169,1174,1204,1319-1320,1325-1326,1333,1339-1345,1360-1363,1366-1370,1378,1385-1386; T.Tr.1642,1679,1690,1694,1759,1860,1875,1877,1891,1899). A second investigator drove the route that Cox had described in her account to law enforcement (P.Tr.1332,1418).[16] Counsel also engaged the services of an expert to review Cox's videotaped statement and advise her about Cox's language, posture and demeanor (P.Tr.1338-1339). In short, counsel undertook an extensive investigation that resulted in a comprehensive assault upon Cox. To suggest that counsel's investigation fell below an objective standard of reasonableness simply ignores the facts.

**1. Kenneth Tucker, Tammy Lister, and Darren Klein**

With regard to Tucker, Lister, and Klein, appellant argues that counsel should have used them to

[15] Counsel did not interview Kurt Nichting; however, counsel did not have his name prior to trial (P.Tr.1203-1204). Counsel was told "Kurt Simon" (P.Tr.144,1204).

[16] Counsel also attempted to find Matt Byler, another witness who allegedly had information to impeach Cox (P.Tr.1328).

reveal Cox's "violent history, life of crime, and false stories" (App.Br.80). Appellant acknowledges that misconduct, alone, is not admissible to impeach a witness (App.Br.80). See State v. Wolfe, 13 S.W.3d 248, 258 (Mo. banc 2000). He also acknowledges that counsel unsuccessfully tried to admit evidence of Cox's previous false allegation of kidnapping, which she made when she was twelve years old (App.Br.84). See id. at 257-258. However, he argues that these witnesses' combined testimony was admissible because it would have shown a recent pattern of lying (App.Br.84).

In denying appellant's claims, the motion court found that Tucker's testimony was not credible or admissible, that Lister's testimony was not credible or admissible and would not have provided a viable defense, that appellant was not prejudiced by the absence of Lister's testimony, that Klein's testimony was not credible or admissible, and that counsel reasonably chose not to call Klein (P.L.F.829-830,832).

Counsel investigated all of these individuals and incidents prior to trial; however, counsel chose not to call them. Counsel's strategic decision, which was informed by thorough investigation, is virtually unchallengeable. Lyons v. State, 39 S.W.3d 32, 39 (Mo. banc 2001).

Nevertheless, appellant argues that the proposed testimony was admissible because it showed a recent pattern of making false reports (App.Br.81). Appellant first relates how Tucker was willing to testify about an incident approximately nine years before trial when Cox left a party with a stranger and then called about an hour later to report that she was locked in a closet, afraid for her life, and in fear of being raped (App.Br.81;P.Tr.1016). Appellant states that Tucker did not take her seriously (a fact Tucker did not testify to) (P.Tr.1016), and that Cox returned a day or two later (App.Br.81).

This incident was not admissible to impeach Cox. There was no evidence that her story was false. Even assuming it was false, it does not reveal a motivation to fabricate to testify falsely in this case. On

direct appeal, this Court held: "witness cannot be impeached by proof of a bad reputation for morality or proof of any specific act indicating moral degeneration." State v. Wolfe, 13 S.W.3d at 258. This Court stated that "specific acts of misconduct, without proof of bias or relevance, are collateral, with no probative force." Id.

This Court has outlined three exceptions to the general rule: where the inquiry shows (1) a specific interest, (2) a possible motivation to testify favorably for the state, or (3) an expectation of leniency. Id. This Court also discussed State v. Williams, 492 S.W.2d 1, 6-7 (Mo.App. St.L.D. 1973), which stands for the general proposition that a "recent" false report to the police may be relevant to impeach a witness. See id. at 6. However, this Court limited the broad language in Williams, stating that trial judges must still determine the relevance of any false report to police. State v. Wolfe, 13 S.W.3d at 258.

Here, Cox's story to Tucker did not fit within any of the three exceptions to the general rule. Additionally, Cox's story was not a false report to police; rather, it was merely a lie told to a boyfriend — an irrelevant specific bad act. Thus, Williams is inapposite.

Appellant next argues that Lister (or Cox) would have related that about five years before trial she and Cox stole a purse and credit cards and then went shopping with the credit cards (App.Br.81). Then, appellant claims, when Lister was arrested, Cox let Lister "take the fall" — the implication being that Cox again lied to the police (App.Br.81). Appellant misconstrues the facts. Lister was, indeed, convicted of this crime because she was identified by a store clerk as having used the credit card; however, Lister apparently never divulged Cox's name to authorities (P.Tr. 1044-1048;P.Ex.Gx6 at 86-88). Thus, this bad act does not reveal that Cox ever gave a false report to the police.

Appellant next argues that Klein would have related how Cox bit his friend's penis (a fact Klein

did not testify to) (P.Tr.928-929) and later robbed Klein (App.Br.81-82). Appellant asserts that Cox also "falsely" told police that Klein's friend had raped her (App.Br.81-82). However, there is no evidence her report was false. Appellant suggests it was false because the police "did not take her seriously" (App.Br.82). But the fact that Cox was not taken "seriously" (the police told her that there was nothing they could do because she was inebriated, and because she willingly went with him and had "rough sex"), does not reveal that the report was false; to the contrary, it shows merely that the police committed the common and unfortunate blunder of believing that "she asked for it" (and appellant would have this court take the same stance). In short, this event was not admissible to impeach Cox because it did not involve a false report to police. Appellant is merely attempting to impeach Cox with acts of moral degeneracy.

**2. Suzanne Kelly and Kurt Nichting**

Appellant claims that counsel was ineffective for failing to impeach Cox's testimony that she had never "owned or handled a .25 caliber pistol" (App.Br.85;T.Tr.1276). He claims that Kelly and Nichting were willing to dispute that fact, and that Nichting was willing to testify that he had loaned Cox a nine millimeter handgun in November 1996 (App.Br.85). In denying these claims, the motion court found that Kelly's testimony proved nothing about the murders and was cumulative, that Nichting was not known to counsel before trial, and that Nichting's testimony was cumulative (P.L.F.828-829,866).

With regard to Nichting, counsel was not ineffective, because despite a reasonable investigation, Nichting's name never surfaced. Had counsel followed up on information she obtained from Kelly and contacted Kurt Simon, she would have learned nothing. With regard to Kelly, counsel chose not to elicit what she knew about Cox's borrowing a gun after her home was burglarized; and that decision, which was informed by thorough investigation, is virtually unchallengeable. Lyons v. State, 39 S.W.3d at 39.

In any event, neither Nichting nor Kelly would have provided a viable defense. Cox's statement that she had never owned or handled a gun was directly impeached by Wendy Smith's testimony that she had seen Cox handling a gun in August 1995 (T.Tr.1744,1746).[17] And that fact was not disputed. The state disputed whether the gun Smith saw was .22 or .25 caliber (T.Tr.1755,1757), but that dispute was obviously aimed at countering the suggestion that Cox possessed the murder weapon in 1995. However, neither Kelly nor Nichting could have testified that Cox had the murder weapon, because Nichting testified that the gun he loaned Cox was a nine millimeter pistol, and Kelly's testimony simply referred to Nichting's having loaned Cox a gun (and Kelly also said the loan occurred after the murders) (P.Tr.139,147,945,947). Thus, additional evidence that Cox had possessed a gun was merely cumulative to Smith's testimony, and counsel is not ineffective for failing to present cumulative evidence. Skillicorn v. State, 22 S.W.3d 678, 685 (Mo. banc 2000).

**3. Cox's alleged admissions**

Appellant contends that counsel was ineffective for failing to elicit evidence from Wendy Smith, Kelly, and Joyce Whittle,[18] which allegedly showed Cox's greater involvement in the murders (App.Br.86). In denying these claims, in addition to the findings outlined above, the motion court found that appellant failed to prove his claims because Smith and Whittle did not testify (P.L.F.830,861-862).

Again, counsel thoroughly investigated these witnesses and incidents; thus, counsel's decision is

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[17] Incidentally, Smith also testified that she knew Cox's reputation in the community for honesty and truthfulness was not good (T.Tr.1749-1750).

[18] In discussing Whittle, appellant cites to T.Ex.HH, an exhibit not admitted into evidence; thus, it should be ignored.

virtually unchallengeable. See Lyons v. State, 39 S.W.3d at 39. With regard to Whittle, counsel was prepared to call her at trial, but did not because Whittle did not appear (T.Tr.1899). In any event, because Smith and Whittle did not testify at the evidentiary hearing, there is nothing in the record to support appellant's claim that Cox could have been impeached with their testimony.

Appellant asserts that this misconstrues his claim, and that all he really wanted counsel to do was lay a foundation for impeachment (App.Br.87). If that is true, then this claim is meaningless. A foundation for impeachment proves nothing. Whittle and Smith's testimony, therefore, was absolutely necessary to prove this claim.

Additionally, at the evidentiary hearing, Kelly could not recall Cox saying that she "wanted to get something out of her rape and murder," and she only admitted with some prompting that she could have told Cox "yeah, go girl" (P.Tr.134-135). On cross-examination she explained that she only said "you go, girl" in reference to Cox's false kidnapping story (P.Tr.147). Thus, this comment would not have revealed that Cox was involved in the murders for gain; rather, this comment would have shown that Cox initially told her friends she was kidnapped — a fact already well established. Counsel was not ineffective for failing to present irrelevant and essentially cumulative testimony. Skillicorn v. State, 22 S.W.3d at 685.

**4. Cox's prior inconsistent statements**

Appellant argues that counsel was ineffective for failing to impeach Cox with prior inconsistent statements which indicated that appellant had been dropped her off at the hospital at about 9:30 or 9:45 (App.Br.87). He also claims counsel should have admitted the police report (T.Ex.B) of Cox's initial interview with the police (App.Br.88). In denying these claims, the motion court found that the extent of cross-examination was a matter of trial strategy, that counsel extensively impeached Cox with inconsistent

statements, and that appellant was not prejudiced by counsel's failing to offer T.Ex.B into evidence (P.L.F.864).

The extent of cross-examination is usually a matter of trial strategy. Rousan v. State, 48 S.W.3d 576, 594 (Mo. banc 2001). Here, counsel thoroughly investigated Cox and her account of the murders, and, as outlined above, counsel prepared a comprehensive assault upon her credibility. On cross-examination, counsel impeached Cox with her inability to recall facts and with prior inconsistent statements from her deposition, her preliminary-hearing testimony, her trial testimony, and her prior statements to police (T.Tr.1182-1272). Counsel's efforts in this regard were reasonable.

With regard to the time that Cox was dropped off at the hospital, counsel specifically elicited that Cox had previously stated that she and appellant had stopped at the cigarette store (the last stop before the hospital) at 9:00 a.m. (T.Tr.1232-1233). Thus, by simple inference, the jury knew that Cox had previously stated that she arrived at the hospital after 9:00 a.m. Additionally, counsel elicited from Cox that it took thirty minutes to reach the hospital from the store, and that she called home from the hospital at 9:30 a.m. (T.Tr.1238,1276).[19] There is no reasonable probability that further impeachment showing the same facts would have changed the outcome of appellant's trial.

With regard to the police report (T.Ex.B), appellant contends that counsel should have elicited that

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[19] Notably, a defense witness testified Cox called from the hospital at about 8:00 or 9:00 a.m. (T.Tr.1715). Allen Fair placed her there as early as 7:00 a.m. (T.Tr.1715). Thus, as is apparent, the times were estimates, and the jury could have easily relied upon a defense witness to conclude that Cox had arrived at the hospital before 9:00 a.m.

Cox initially did not mention appellant's clothing, appellant's handcuffs, or the stops at the Port Valero and the cigarette store (App.Br.88-89). In fact, however, counsel did elicit this information — either specifically or generally — from Cox and Officer Schmidt (see T.Tr.1272-1275,1354-1355,1358-1359). And, as counsel explained at the evidentiary hearing, she did not admit the report because she had gotten what she needed on cross-examination (P.Tr.1202). Counsel's performance was reasonable, and appellant was not prejudiced.

**5. Monica Clark**

Lastly, appellant claims that counsel was ineffective for failing to call Monica Clark,[20] who would have testified that she called appellant at 8:30 a.m. on the day of the murders (App.Br.89). In denying this claim, the motion court found that Clark's testimony conflicted with the defense evidence and conflicted with appellant's statement to the police, and that counsel had no duty to present evidence that was harmful to the defense (P.L.F.827).

At the evidentiary hearing, counsel testified that her investigator interviewed Clark before trial (P.Tr.1144). Consequently, counsel's decision not to call Clark, which was informed by thorough investigation, is virtually unchallengeable. Lyons v. State, 39 S.W.3d at 39. Moreover, it is evident why counsel chose not to call Clark.

As the motion court stated, Clark's testimony conflicted with aspects of the carefully constructed assault upon Cox's credibility (P.L.F.827). In addition, Clark's 8:30 a.m. time directly conflicted with

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[20] In discussing Clark's testimony, appellant cites to P.Ex.Nx6, a police report not admitted into evidence; thus, it should be ignored.

appellant's account to the police (P.Ex.MMM at 31,34,48). Appellant argues, however, that these problems were an insufficient reason not to call Clark (App.Br.89). Appellant claims Clark's call to appellant at 8:30 was "important" because it would have impeached Cox, who testified that she and appellant were driving around at that time (App.Br.89). Also, while he acknowledges its limited value, appellant argues that Clark would have contradicted Cox's account of a toolbox being in appellant's truck (App.Br.89).

In fact, Clark's testimony was not inconsistent with the state's overall theory. Cox did not know exactly what time she was dropped off at the hospital. She testified that she was dropped off at 8:30 or 9:00 a.m., or even after 9:00 (T.Tr.1157,1232-1233). However, one defense witness placed her at the hospital as early as 8:00 a.m., and another placed her at the hospital at 7:00 a.m. (T.Tr.1715). Thus, even if Clark had testified, the jury could have reasonably concluded that appellant dropped Cox off around 8:00 or 8:30 a.m., drove to the Williamsburg Inn,[21] and received his telephone messages from Clark at approximately 8:30.[22] And the toolbox testimony would have accomplished virtually nothing because (1) Cox was not certain she saw a toolbox (T.Tr.1146), and (2) Clark admitted that appellant had free access to his toolbox prior to February 23, 1997 (P.Ex.L at 31).

Additionally, there were major drawbacks to calling Clark and putting the state on notice of her testimony. She corroborated a portion of Hileman's testimony, and she corroborated aspects of Cox's story. Clark, like Hileman, had heard appellant's marijuana-in-the-cereal-box story (P.Ex.L at 18). And,

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[21] The hospital was less than a mile from the Williamsburg Inn (P.Ex.BBB).

[22] Clark called when she heard appellant "stir" indicating that she may have heard him come home at that time (P.Ex.L at 17).

to make matters worse, Clark testified that the marijuana-in-the-cereal-box incident occurred on the morning of the murders (giving credence to Hileman's statement that the marijuana story was told incident to the murder confession)(P.Ex.L at 18). No evidence suggested that Clark and Hileman were associates, or that they shared this "funny" story about appellant's marijuana; thus, had Clark's testimony come to the state's attention, the state could have corroborated part of the so-called snitch's testimony. Also, Clark testified that she called appellant to give him telephone messages from the previous night (or earlier that morning) (P.Ex.L at 16-17); thus, had Clark testified, the jury could have easily inferred that appellant had been out much of the night and missed his telephone calls. Further, Clark testified that appellant exchanged still more quarters for dollars (P.Ex.L at 35). Counsel reasonably decided not to call Clark.

### C. Conclusion

The jury knew what kind of witness Cox was. Indeed, the prosecutor expressly acknowledged that appellant chose Cox because she was the kind of person "who wouldn't be believed" — a person from the "seamy underbelly of life" (T.Tr.1951). Thus, to the extent that it was important to portray Cox as unreliable, unbelievable, and untrustworthy, counsel was highly effective.

## VI. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS THAT THE PROSECUTOR EXCLUDED EVIDENCE AND THEN IMPROPERLY SUGGESTED THAT IT DID NOT EXIST.

Appellant contends the prosecutor committed misconduct by keeping out evidence of Terry Smith's alleged involvement in the crime and Cox's previous kidnapping story and then suggesting that the evidence did not exist (App.Br.92). He also claims counsel was ineffective for failing to object to the alleged misconduct (App.Br.92).

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

In denying these claims, the motion court found that the state did not elicit any false testimony, that the prosecutor's questioning was proper, that counsel acted reasonably, and that appellant was not prejudiced (P.L.F.880,903-904).

This claim of misconduct was not pled in the amended motion (P.L.F.205,214-215,227-228). Additionally, trial-court error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances. State v. Carter, 955 S.W.2d 548, 555 (Mo. banc 1997). Here, appellant did not allege rare or exceptional circumstances, and the prosecutor did not commit any misconduct.

### A. Terry Smith Evidence

Appellant claims that the state excluded evidence of Terry Smith's involvement and then suggested, through the testimony of Officer Bowling, that it did not exist (App.Br.92-93). The prosecutor properly sought to exclude evidence that Terry Smith committed the crime because there was no evidence linking

Smith to the murders. See State v. Chaney, 967 S.W.2d 47, 55 (Mo. banc 1998).

Additionally, the prosecutor's questioning of Bowling was proper because it did not falsely imply that the police had not investigated other leads. To the contrary, Bowling testified that the investigation was extensive, and that they had "talked with everybody that [they] could possibly find" (T.Tr.1024-1025). Only then did the prosecutor question Bowling as follows:

> Q On Monday, Tuesday or Wednesday, did you develop any leads that were meaningful or that went anywhere.
>
> A. The only thing that really stood out was that it was kind of general knowledge in the area that Mr. Walters carried large sums of cash and bragged about it apparently or had made no attempt to hide that from anyone.
>
> . . .
>
> Q Other than that, did you have any leads or any focused as to a possible perpetrator?
>
> A Not at that time, no.

(T.Tr.1026). This testimony indicated merely that law enforcement had not developed any other "meaningful" leads that had led the police to "focus" on any particular suspect. This was not misleading.

Additionally, after Bowling's testimony, counsel argued that the state had opened the door to questioning Bowling about Smith (T.Tr.1033-1035). The court disagreed, but ruled that counsel could question Bowling generally about "leads" (T.Tr.1035-1036). Counsel then elicited that Bowling had been given a number of leads, and that after Cox gave her statement a number of leads were "not followed up on" (T.Tr.1036-1037). Thus, while there was no basis to argue prosecutorial misconduct, counsel took

advantage of the prosecutor's questions and informed the jury, at least by inference, that the police had dropped a number of potentially good leads.

**B. Cox's Lie**

Appellant claims the prosecutor excluded evidence of Cox's previous kidnapping story and then suggested (through Richard Kremenak), that Cox had never told a "major lie or engaged in some major fabrication" (App.Br.93). Evidence of Cox's kidnapping story was properly excluded. State v. Wolfe, 13 S.W.3d 248, 257-259 (Mo. banc 2000).

Additionally, the prosecutor's questioning of Kremenak was proper. Kremenak testified that Cox's reputation for truthfulness was "[n]ot too good" (T.Tr.1766). Accordingly, on cross-examination, the prosecutor tested the basis for Kremenak's opinion and elicited that Kremenak did not know of any "major fabrication" or "significant lie" (T.Tr.1767). This was proper, State v. Curry, 372 S.W.2d 1, 8 (Mo. 1963), and it did not elicit false or misleading testimony.

## VII. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS RELATED TO TERRY SMITH.

Appellant contends counsel was ineffective for failing to investigate and present evidence (through numerous witnesses) that Terry Smith and Jessica Cox committed the murders (App.Br.96). Appellant contends the state failed to disclose evidence of Smith's involvement (App.Br.96). Also, appellant claims appellate counsel was ineffective for failing to challenge the court's excluding references to Smith (App.Br.96).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Counsel was Effective

In denying appellant's claims, the motion court found that George Lane did not testify at the evidentiary hearing, that Lane's testimony would have been cumulative and would have impeached defense witnesses, that Lane could not connect Terry Smith to the murders, that counsel reasonably chose not to call Lane, that Reeder's testimony at the evidentiary hearing was not credible, that Reeder's testimony was presented at trial to no avail, that counsel effectively investigated Reeder, that Dayton was not credible and offered cumulative testimony, that counsel effectively investigated Dayton, that John Garrison's testimony showed no connection between Smith and the Murders, that Angela Elliott's testimony about a gun was hearsay and cumulative, that counsel effectively investigated Elliott, that Fred Moss's testimony was not admissible, that Van Purvis' testimony was speculative and did not prove Smith's involvement, that Kenneth Palmer's testimony only cast a bare suspicion and was not admissible, that Jim Spencer's

testimony was generally cumulative and proved nothing, that Richard Dwyer's testimony was not exculpatory and revealed nothing new, that counsel reasonably investigated Smith, that appellant failed to present evidence of Smith's involvement, that appellant was not prejudiced by counsel's failure to present a map, and that appellate counsel reasonably winnowed out this claim (P.L.F.831-843,867,871-872).

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

**1. Counsel's investigation was reasonable**

On October 28, 1998, counsel learned of Smith's alleged involvement (P.Tr.597). Phillip Dayton told counsel that he and Smith had driven by the Walters' home and talked about robbing it (P.Ex.Ax4). Counsel investigated Dayton's story and obtained the state's assistance in investigating leads (P.Tr.596-599; see e.g. P.Exs.Ax4,Bx4,Cx4,Dx4,Gx4). At trial, counsel marshaled the facts throwing suspicion on Smith and made an offer of proof (T.Tr.961,1401,1410).

Barbara Reeder testified that she knew Smith, and that Smith was a witness against her in her pending case in which she was charged with burglarizing George Lane's home (T.Tr.1402-1403). She testified that in January 1997, Smith and Jessica Cox unsuccessfully tried to "lure" Lane and Reeder to dinner (T.Tr.1403-1404). Reeder testified that she had seen Smith and Cox together on two or three occasions (T.Tr.1404,1407).

Phillip Dayton testified that he and Smith went to Camden County toward the end of December 1996 or beginning of January 1997 (T.Tr.1412). He said they burglarized a car lot (T.Tr.1412). Smith talked to him about committing a robbery of "two old people" in the general vicinity of the Walters' home, on Highway 7, outside Greenview (T.Tr.1412-1413). Dayton said they drove by the house several times;

but, when shown a photograph of the victims' home, he could not say it was the same house (T.Tr.1413). He said Smith obtained two .25 caliber automatic guns (T.Tr.1413). Smith traded away one of those guns on January 3, 1997; Dayton kept the other gun until he gave it to Smith on about February 1, 1997 (T.Tr.1413,1418). He admitted that Smith could not convince him to do the robbery, and that they never formulated a plan to commit the robbery (T.Tr.1416). And, while he had spent nearly a year in jail with appellant, he admitted that he never told appellant about Smith's idea of robbing the Walters (T.Tr.1419). The first time he said anything about Smith's alleged involvement was when he talked to appellant's investigator (T.Tr.1419-1420).[23]

Green testified that she had tested one of the .25 caliber guns (serial no. 092222) that Smith had traded (T.Tr.961-962). She testified that the bullet recovered from Leonard Walters and the expended cartridge had not been fired by that gun (T.Tr.962). She said she would expect the other gun that Smith traded (serial no. 094776, same make and model) to leave similar marks, i.e., she would expect Smith's other gun to be excluded (T.Tr.972-973). But she admitted she could not "absolutely 100 percent" eliminate the other gun (T.Tr.974).

Appellant now argues that counsel's investigation was inadequate, and he lists various details that were not elicited and various people that were not interviewed (App.Br.99-102). However, the only "new" evidence allegedly linking Smith to the murders (and the only new evidence unearthed in the year

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[23] Counsel's investigation had turned up other facts, e.g., that Smith was violent, that Smith was "heavy into drugs," that Smith had broken into Reeder's old residence, and that Smith and Dayton had robbed Lane (P.Ex.Bx4).

and half after appellant's trial), was (1) a more positive statement from Dayton identifying the victims' home, and (2) the fact that Dayton had seen vehicles in the driveway similar to the vehicles that the victims had in their driveway (App.Br.101-102;P.Tr. 767-768;P.Ex.CCC).[24]

At the evidentiary hearing, Dayton was finally able to look at a picture of the victims' home and say it "could be" the house that Smith had talked about robbing (P.Tr.767-768).[25] Also, Dayton said that a photograph of a four-door car "could possibly be" the car he saw in the victims' driveway (P.Tr.768).[26]

However, none of this "new" evidence linking Smith to the murders was missed due to counsel's failing to investigate. Counsel interviewed Dayton and presented his testimony in an offer of proof. If Dayton failed to disclose information to counsel that he disclosed to the police, counsel cannot be faulted. See Lyons v. State, 39 S.W.3d 32, 41 (Mo. banc 2001) ("counsel cannot be deemed ineffective for failing to discover evidence . . . that [the witness] did not share with them during the investigation.").

In short, counsel's investigation of Smith was reasonable. The record shows that counsel's

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[24] Appellant points out that Mummert positively identified Smith as one of the men who obtained the guns (something Mummert could not do before trial, ostensibly because he was shown a too-recent picture of a clean-shaven Smith); however, that Smith had obtained the guns was never in question.

[25] This slightly stronger identification was undoubtedly made possible by the fact that post-conviction counsel showed him the pictures of the house the night before he testified, and by the fact that he drove by the house immediately prior to testifying.

[26] Dayton's having seen a vehicle similar to the victims' vehicle was recorded in a police report generated November 18, 1998 (the day Dayton gave his offer-of-proof testimony); thus, the theory goes, counsel also should have learned as much from Dayton (P.Ex.CCC).

investigation turned up every salient fact that the subsequent post-conviction investigation turned up over the next year and a half. Moreover, because the evidence of Smith's involvement is virtually the same now as it was before trial, there is no reasonable probability that the outcome of trial would have been different if counsel had been able to include Dayton's slightly more positive identification of the house. Dayton still could not provide any evidence that Smith committed the murders. In fact, Dayton testified that, while Smith talked about robbing the house, they never formulated a plan to do it because Dayton did not want to be involved (T.Tr.1416). And, in the absence of evidence actually linking Smith to the murders, evidence that he had a motive or opportunity was not admissible. State v. Chaney, 967 S.W.2d 47, 55 (Mo. banc 1998).[27]

**2. Appellant was not prejudiced**

Even assuming that counsel could have done more, appellant was not prejudiced. As the motion court stated, Dayton was not credible. Even though he was with appellant for over a year in jail, he never divulged Smith's alleged involvement (T.Tr.1419). Dayton had a dubious explanation for his failing to talk to law enforcement about Smith (T.Tr.1421); however, he never could explain why he did not tell appellant, his jail buddy, about Smith. Dayton had extremely important information; yet, he held his tongue for months. And, to make matters worse, he only contacted appellant with this damning information about Smith after pleading guilty in a case where Smith had been the state's witness against him.

This dubious information about Smith's alleged intent to commit a robbery at the victims' home

[27] Whether the evidence sufficiently linked Smith to the murders is discussed in greater detail below.

(without any evidence actually linking Smith to the murders) would have enjoyed no reasonable probability of changing the outcome of appellant's trial. In attacking the state's eyewitness and the state's jailhouse informant, appellant simply states that they were incredible. However, he offers nothing better in Dayton.

Additionally, aside from a bare suspicion of Smith's involvement, appellant's theory lacks any credible evidence to support it. Undoubtedly, Cox was with appellant on the night she claimed to have been with him: appellant admitted as much to the police, and Cox knew far too much about appellant's whereabouts to seriously question that aspect of her story. Also, given her knowledge, Cox was undoubtedly present for the murders. Thus, appellant would suggest that Cox spent the night with him on February 20, and then spent another night with Smith robbing and murdering the Walters (sometime before the bodies were discovered on February 23). However, there is no evidence that Smith was in the area (or with Cox) after Cox disappeared with appellant. And, tellingly, none of Cox's friends or significant others identified another disappearing act in the relevant time period.

Thus, while Cox and Hileman had credibility problems, under the circumstances of this case, there is no reasonable probability that the dubious testimony of appellant's friend, which cast a bare suspicion upon Smith, would have altered the outcome of appellant's trial.

### C. Alleged Brady Violation

Appellant argues that the state failed to disclose exculpatory evidence as required by Brady v. Maryland, 373 U.S. 83, 86-89 (1963). The state did not disclose the police report of Dayton's interview on November 18, 1998 (P.Ex.CCC). This report contained Dayton's statement that he and Smith had driven by a house on Highway 7, outside of Greenview, and that Smith had talked about robbing the "2 old people" who lived there (P.Ex.CCC). This report also noted that Dayton had seen an "older 4 door

car parked near the highway with a 'for sale' sign on it" (P.Ex.CCC).

Appellant argues that this was material evidence that had to be turned over because it "identified the Walters' house as the house Smith staked-out to rob, and Dayton described how he and Smith drove by and observed it several times" (App.Br.105). However, as the offer of proof at trial shows, the defense already had this information (T.Tr.1410-1422). Additionally, a pre-trial "Memo to Casefile" shows that on October 21, 1998, Dayton told the defense that "Smith took Dayton by this house in Greenview (the Walters) numerous times and said this is where we are going to do the robbery" (P.Ex.Ax4). Thus, the defense already knew that Dayton and Smith had driven by the victims' home. State v. Calvert, 879 S.W.2d 546, 548 (Mo.App. W.D. 1994) ("the state cannot be faulted for nondisclosure if the defendant had knowledge of the evidence at the time of trial").

In short, Dayton was a defense witness who had already divulged what he knew, and he was easily accessible to counsel for further probing. Thus, the state's failing to disclose a report of what the state learned from Dayton in preparing for trial neither violated Brady nor hindered the defense in obtaining allegedly exculpatory evidence. See State v. Brooks, 960 S.W.2d 479, 494 (Mo. banc 1997) ("The prosecution has no obligation to disclose evidence of which the defense is already aware and which the defense can acquire.").

Appellant also points out that the state failed to disclose a report dated November 10, 1998, which allegedly would have led to information showing that Smith obtained the .25 caliber guns discussed above (App.Br.105-106). However, as noted above, it was well known that Smith had obtained the guns.

Appellant argues that the state violated its "obligation to do justice" (App.Br.106). The state certainly has an obligation to do justice; however, appellant has not shown that the investigation in this case

was lacking in any material respect. And, tellingly, the post-conviction investigation failed to turn up any substantial evidence that someone other than appellant committed these murders.

**D. Appellate Counsel was Effective**

Lastly, appellant argues that appellate counsel was ineffective for failing to assert on direct appeal that the trial court improperly excluded references to Terry Smith (App.Br.107). This claim turns upon whether there was sufficient evidence to connect Smith to the murders. See State v. Chaney, 967 S.W.2d at 55

Citing State v. Butler, 951 S.W.2d 600 (Mo. banc 1997), appellant claims Dayton's account was sufficient to link Smith to the murders (App.Br.103-104). In Butler, the witness who discovered the victim's body testified that immediately prior to the discovery, he saw a vehicle coming from the area of the body. Id. at 607. The vehicle was consistent with a vehicle owned by a man named Malloy. Id. The description of the driver was also consistent with Malloy. Id. Malloy's employer described a ring that Malloy tried to sell him (for a ridiculously low price), and the ring was largely consistent with the victim's stolen ring. Id. Also, at the time of the attempted ring sale, Malloy's companion sarcastically commented upon how Malloy had obtained the ring from his aunt's inheritance, saying "yeah, she was only too happy to give it to you." Id. There was also substantial evidence of Malloy's motive and opportunity. Id. at 607-608. Thus, in addition to motive and opportunity, there was evidence that Malloy committed an act directly connecting him with the crime.

In appellant's case, however, Dayton's account of driving by the victim's house several weeks before the murders did not directly connect Smith with the murders. According to Dayton, Smith talked about robbing "two old people," but they never finalized a plan because Dayton did not want to be involved

(T.Tr.1416). Unlike Butler, there was no evidence that Smith was at or near the scene of the crime at the time of the crime. To the contrary, Dayton's account put Smith at the scene of the crime several weeks before the murders. Also, unlike Butler, there was no physical evidence linking Smith to the murders. Thus, while Smith may have once contemplated a burglary of the victims' home, there was no evidence that Smith carried out his alleged plan.

Consequently, in deciding which issues to raise, appellate counsel did not overlook a claim that was so obvious that reasonably competent counsel would have recognized it and asserted it. See generally State v. Moss, 10 S.W.2d at 514. To the contrary, lacking evidence that Smith actually committed some act connecting him with the crime, counsel wisely chose to focus her efforts (and limited briefing space) on potentially more viable claims.

Additionally, even if the court erred in excluding references to Smith, there is no reasonable probability that such a claim would have resulted in reversal. Dayton's testimony was not credible; thus, the exclusion of it, even if erroneous, was not prejudicial to appellant.

## VIII. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE OF ACTIVITY AT THE VICTIMS HOUSE.

Appellant contends counsel was ineffective for failing to present evidence of activity at the victims' home which allegedly showed that Cox was lying (App.Br.109). This activity consisted of (1) a Bronco or Blazer and another vehicle at the victims' home on February 19, 1997; (2) a Bronco or a Blazer at the victims' home on February 22, 1997; and (3) a brown vehicle at the victim's home on February 23, 1997 (App.Br.109). Additionally, appellant notes that counsel could have elicited from Cox that she was in a Blazer near the time of the murders, and that counsel could have elicited from Leonard and Charles Rickey that they might have seen Leonard Walters alive on Thursday or Friday (App.Br.109).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Counsel was Effective

In denying appellant's claims, the motion court found that one claim (Cecil McConnell's proposed testimony) lacked any direct evidence to support it, that counsel's selection of witnesses was a matter of trial strategy, that the various witnesses would not have provided a viable defense, and that the various bits of evidence proved nothing about the murders (P.L.F.817-819,826-827).

### A. Vehicles at the Victims' Home

At the evidentiary hearing, Frank Bryant testified that on the evening of February 19, 1997, he saw a "green Continental" with "four or five black people" pull into the victims' driveway (P.Tr.1536,1539).

He also saw a blue Blazer or Bronco, with a white, grey, or silver stripe, parked in the driveway (P.Tr.1536,1540-1541). There was a "white male" standing by the Blazer or Bronco (P.Tr.1541). This story proved nothing. If Bryant can be credited, some people were at the Walters' residence. Perhaps someone actually interested in buying the Cadillac had stopped by to look.

Appellant did not present Cecil McConnell's testimony (because he had died prior to the evidentiary hearing); however, McConnell did report that on February 22, 1997, between 11:00 a.m. and 3:00 p.m., he had seen a white Bronco or Blazer pulling out of the Walters' residence (P.Ex.MM). He did not see the occupants. This story also proved nothing. Perhaps someone pulled into the driveway to turn around. In any event, counsel told her investigator to check out this report and subpoena McConnell if there was anything "good;" McConnell, tellingly, was not subpoenaed (P.Tr.1328-1329).

Based on these references to a "Bronco" or "Blazer," appellant claims counsel should have elicited from Cox that she was in a Blazer on the evening of February 19, 1997, when she rode up to Eldon, Missouri, with Brian Beard, Scotty Gift, and Alan Fair (App.Br.112; P.Ex.Hx6 at 317). However, nothing actually linked Beard's Blazer with either of the two Broncos or Blazers seen at the victims' residence; and respondent would venture to guess that there are many Broncos or Blazers in the lake area. Thus, eliciting the bare fact that Cox had been in a "Blazer" would have availed appellant nothing.

And, finally, Glenda Wilson testified that on February 23, 1997, at about 8:00 a.m. and 11:20 a.m., she saw a large, brown, dirty car at the Walters' residence (P.Tr.786-789). She opined that the car was "parked kind of weird like as if someone was ready to get away or something" (P.Tr.787). She also said that she saw an "older man" sitting in the Cadillac, which was consistent with Mr. Walters being dead in the Cadillac (T.Tr.786-787). However, this brown car was not connected in any way to Cox or the

murders; thus, it proved nothing. Counsel did not recall why she did not call Wilson at trial, but it appears counsel chose not to because her testimony was irrelevant.

In short, with regard to all of this evidence, appellant proved nothing more than what the initial reports showed. He cannot claim that counsel's investigation was deficient when he failed to gather any new evidence making these bits of information valuable to the defense. See Lyons v. State, 39 S.W.3d 32, 39 (Mo. banc 2001) ("Appellant cannot claim that his counsel did not adequately investigate [a witness'] testimony when he has presented no evidence beyond that gathered by his counsel in [the pre-trial] deposition.").

**B. The Rickeys' Testimony**

Before trial, counsel deposed Charles and Leonard Rickey (P.Ex.Kx6,JX6). Charles testified that he had gone to the victims' residence to dump sewage on the Friday before he discovered the body on Sunday, February 23, 1997 (P.Ex.Kx6 at 4). He initially testified that he thought he had seen Leonard Walters on that Friday (P.Ex.Kx6). On cross-examination, he admitted that he had no recollection of actually seeing Mr. Walters on that date, but that he just usually saw Mr. Walters when he went to dump sewage (P.Ex.Kx6 at 19). Additionally, he admitted that when he first went to the residence on Sunday morning, he did not see Mr. Walters sitting in the Cadillac (P.Ex.Kx6 at 20). Accordingly, he admitted it was possible that he had not seen the body on the previous Friday (P.Ex.Kx6 at 19-20).

Leonard Rickey, Charles's father, said he could not remember when they had last been to the victims' residence before discovering the body (P.Ex.Jx6 at 5). He guessed that it might have been two or three days before (P.Jx6 at 5). He testified that they dumped a load Sunday morning without seeing Mr. Walters in the Cadillac (P.Jx6 at 7). He also estimated that he had last seen Mr. Walters alive three or

fours days "before he was killed," meaning Thursday or Wednesday, or maybe a couple of days before (P.Jx6 at 10,13-14).[28] He testified that Mr. Walters had a habit of sitting in his car or working on his truck (P.Ex.Jx6 at 16).

Trial counsel testified that she did not call the Rickeys to offer such testimony because they could not establish what day they had seen Mr. Walters alive (P.Tr.1139-1141). This was reasonable. Neither man remembered seeing Mr. Walters alive after Thursday morning; thus, even together, their testimony could not prove a later time of death.

Accordingly, rather than relying upon the Rickeys, counsel relied upon Robert Morgan (and corroborative documentation), and Larry Graham (T.Tr.1875,1878-1879,1892,1894). This selection of witnesses, after thorough investigation, was a matter of trial strategy that is virtually unchallengeable. Lyons v. State, 39 S.W.3d at 39.

Additionally, appellant was not prejudiced. The Rickeys could not establish a later time of death, and appellant's suggestion that Leonard Rickey could have countered Kenneth Stoller's testimony about seeing Mr. Walters in the car on Thursday morning at 8:30 a.m. (T.Tr.1929) is not accurate. Leonard's testimony would have shown that Mr. Walters liked to sit out in his car "around noon" (P.Ex.Jx6 at 16). If Leonard had testified about Mr. Walters' habit, it would have shown that he could sit in the car for a longer period of time without rousing suspicion that something was wrong. And that in turn would have undermined the favorable testimony that counsel had elicited from James Jungles, who stated that he had

[28] At the evidentiary hearing, three and a half years later, this answer shortened to "two or three days" before discovering the body (P.Tr.1558).

initially estimated the time of death to be within 24 to 36 hours because he thought it unlikely that a person could sit for three days without someone noticing (T.Tr.991).

## IX. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS RELATED TO KATHLEEN GREEN, JENNY SMITH, AND JAY DIX.

Appellant contends counsel was ineffective for failing to impeach Kathleen Green with her deposition testimony about "thousands of shoes" that could have left the footprint on the victims' linoleum, failing to impeach Jenny Smith with a "pro-prosecution memo" she had written in an unrelated case, and failing to impeach Jay Dix with his prior statement about shotgun pellets (or failing to object to the alleged non-disclosure of the change in Dix's opinion)(App.Br.114). Appellant also claims that the state violated Brady by failing to disclose the pro-prosecution memo and the change in Dix's opinion (App.Br.114).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Kathleen Green

At trial, Green testified that the soles of the shoes recovered at Port Valero had class characteristics similar to the shoes that had left footprints on the victims' floor (T.Tr.939). She admitted, however, that she could find no matching individual characteristics (T.Tr.941). Appellant claims that counsel failed to "impeach" this testimony by eliciting, as she did at a deposition, that "thousands" of shoes could have the same soles (App.Br.115,117-118).

In denying this claim, the motion court found that the extent of cross-examination was a matter of trial strategy, that the claim was refuted by the record, that the evidence would not have provided a viable defense, and that appellant was not prejudiced (P.L.F.861).

At trial, Green admitted that many people could own shoes with the same class characteristics (T.Tr.937). On cross-examination, counsel elicited that there were probably a "number" of shoes with the same sole (T.Tr.950). Counsel further elicited that different brands/manufacturers will use the same sole design (T.Tr.950-951). In short, the jury was informed that the sole was not unique, and that the sole could have been on a great number of shoes. Counsel's performance was reasonable.

**C. Jenny Smith**

Appellant claims counsel was ineffective for failing to impeach Smith with a letter that showed her "pro-prosecution" bias (App.Br.115). Smith had sent this letter to another prosecutor in an unrelated case (P.Ex.Cx6). And in that letter she had stated that she wanted "to help you all I can," and that the prosecutor could "really do some damage" (P.Ex.Cx6). She had also, in a joking manner, referred to the prosecutor's "charming ways" (P.Ex.Cx6).

Appellant claims that counsel should have somehow acquired this letter and impeached Smith's credibility with it (App.Br.115-116). Alternatively, appellant claims that the state violated Brady in failing to disclose it (App.Br.115-116).[29]

In denying this claim, the motion court found that counsel was not ineffective for failing to impeach her own witness, that appellant was not prejudiced, and that the state had not violated Brady by failing to

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[29] Citing P.Ex.Qx7, appellant also suggests counsel was ineffective for failing to reveal that "it was more likely Mrs. Walters struggled over the shotgun" (App.Br.115). This claim was not included in the amended motion; it should be ignored. In any event, P.Ex.Qx7, does not prove that a struggle was "more likely."

disclose the letter (P.L.F.855-856).

First, because this letter was never available to counsel, counsel was not ineffective for failing to use it at trial. Second, the state had no obligation under Brady to disclose it: it neither exculpated appellant nor impeached Smith's testimony in this case. It may have shown that she had some interest in an unrelated case, or some special relationship with the prosecutor in that case, but it revealed nothing material about her interest in appellant's case.

Furthermore, even if it should have been disclosed, appellant was not prejudiced. The letter did not reveal a strong general bias for the state (or any motivation to fabricate); rather, it simply tended to show that she was willing to aid the prosecutor in making sense of the complicated matters that her testing had covered. In other words, her testing in the other case had revealed various incriminating facts, and due to the complicated nature of the evidence, it was necessary to outline them carefully.

Additionally, had appellant impeached Smith, it would have reflected poorly upon the defense. Appellant would have been attacking the integrity of Smith; however, on the other hand, appellant relied upon Smith's integrity by calling her as one of his own witnesses (T.Tr.1826). Thus, had the defense impeached her, the minimal value of such impeachment would have been counterbalanced by the adverse effect it had upon the defense.

**D. Jay Dix**

Just prior to Dix's testimony, the prosecutor argued for the admission of certain photographs due to the "controversy" over "where the [shotgun] pellets went" (T.Tr.1043). The prosecutor noted that the defense had raised the issue of "missing pellets" for the first time in opening statement, and he asserted that the photographs would help Dix explain the missing pellets (T.Tr.1043-1044).

Dix then testified that, as indicated in his autopsy report, some of the pellets exited the body (T.Tr.1060). However, in looking at a picture of the victim's clothing, he noted no exit holes; thus, he concluded that the pellets that had left her body must have remained inside her clothing (T.Tr.1061). On cross-examination, counsel elicited that Dix had stated in his report that "most of the [shotgun] charge" had exited the body (T.Tr.1074-1075). He reiterated his opinion, however, that, in light of the photographs, none of the pellets had exited the clothing (T.Tr.1075-1076). On re-direct, Dix admitted that he now thought his report was wrong, and that most of the pellets must have remained in the body (T.Tr.1078). On recross-examination, he stated that his opinion had changed that morning when he had looked at the photographs of the victim's clothing (T.Tr.1082-1083). Counsel then elicited that Dix had had the opportunity to look at the clothing at the autopsy, and that Dix had, at that time, written that "most of the charge exits the body" (T.Tr.1083-1084). Counsel also elicited that Dix indicated that only "some of the charge remains in the soft tissue on the right side of the chest" (T.Tr.1084).

The next morning, defense counsel requested a mistrial based upon the testimony of Dix (T.Tr.1168). She argued that his testimony was substantially different from his report, and that the change adversely affected the defense theory (T.Tr.1168). Counsel also pointed out that the state had failed to disclose the change (T.Tr.1168).[30] The prosecutor pointed out that he had only learned of counsel's theory during opening statement, and that he had then contacted Dix to discuss the missing pellets (T.Tr.1169). The Court denied the request for a mistrial, noting that Dix had only changed his opinion "just before

[30] Thus, the record refutes appellant's claim that counsel did not object to the state's failure to disclose.

coming in to testify" (T.Tr.1169). The Court also noted that witnesses often say unexpected things on the stand, and that counsel had the opportunity to impeach Dix (T.Tr.1069-1070).

Appellant now claims that counsel was ineffective for failing to elicit that Dix had previously told her, based on his understanding that there was no shotgun damage in the house (and given his initial impression that most of the pellets exited the body), that the victim was shot outside the house (App.Br.116-117). Alternatively, he claims the state violated Brady by failing to disclose the change in Dix's testimony (App.Br.117,119-120).

In denying these claims, the motion court found that the scope of cross-examination was a matter of trial strategy, and that appellant had failed to show that he was prejudiced by counsel's alleged failure (P.L.F.862-863).

As the record shows, if counsel had asked Dix about his previous statement — which assumed both that the charge exited the body (and clothing) and that there was no damage in the house — Dix would have simply explained, again, that his opinion had changed due to the photographs which indicated that the charge had not left the clothing. In other words, asking Dix about a previous opinion that was based in part upon a premise that he later found to be incorrect would have availed appellant nothing. Instead, counsel took a better approach and cross-examined Dix in an attempt to undermine his current view based upon the recently-viewed photograph. Specifically, counsel elicited that Dix had actually seen the clothing at the time he made his original finding that most of the charge had exited the body (T.Tr.1083-1084). This line of cross-examination, which attempted to restore the original premise for Dix's original opinion was far more effective.

With regard to the alleged discovery violation, the claim was not included in the amended motion

and it is not properly raised here. Additionally, the claim is not cognizable. Trial-court error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances. State v. Carter, 955 S.W.2d 548, 555 (Mo. banc 1997). Appellant failed to allege any rare or exceptional circumstances.

In any event, there is no reasonable probability that earlier disclosure (if it were even possible) would have changed anything. Dix's opinion changed at about 11:00 a.m. on the day he testified. Had the state disclosed the change then, the defense could not have done anything more than it did. Counsel effectively handled this change, and appellant has not shown that the defense could had done anything more than what was done.

## X. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE OF HIS GAINFUL EMPLOYMENT AND SHOE SIZE.

Appellant claims counsel was ineffective for failing to present evidence that he was gainfully employed, contrary to the state's assertion that he needed money (App.Br.121). He also claims counsel was ineffective for failing to offer the shoes he was wearing at trial as additional evidence of his shoe size, which would have shown that he did not own the size-ten shoes that were found at Port Valero (App.Br.121).

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

In denying these claims, the motion court found that appellant's employer's testimony (or photographs of the financial/employment-related notes in appellant's room) would not have provided appellant with a viable defense (or were not admissible), and that appellant was not prejudiced by counsel's decision not to admit the shoes (P.L.F.854,856,866).

### A. Appellant's Gainful Employment

Appellant's claim regarding gainful employment was not pled in the amended motion (P.L.F.168); it should not be reviewed. In any event, Britt's testimony at the evidentiary hearing does not support the claim that appellant has raised here. Britt testified that appellant was a reliable worker; he also testified that he had advanced appellant $800.00 because appellant was having financial troubles (P.Tr.181,189). This testimony was completely cumulative to Britt's trial testimony which indicated that appellant was a "good painter and capable," but that appellant was "broke" and received an $800.00 advance (T.Tr.1917-1918).

Counsel is not ineffective for failing to present cumulative evidence. Skillicorn v. State, 22 S.W.3d 678, 685 (Mo. banc 2000).

Appellant argues that photographs of notes in his room showed that he was making money; however, even if the content of the notes could be considered for the truth of the matters asserted therein (which they cannot), they would not prove that appellant had no financial problems. Britt testified that appellant was broke, and other evidence revealed appellant's involvement with drugs. There is no reasonable probability that Britt's testimony or photographs of the notes would have altered the outcome of appellant's trial.

**B. Appellant's Shoes**

There is also no reasonable probability that appellant's size-seven-and-a-half shoes (which he wore at trial) would have altered the outcome of trial. There was evidence that appellant wore size-eight shoes (T.Tr.1866). Additional evidence of small shoes would have been cumulative. Counsel testified that she chose not to use appellant's shoes because she did not believe they would be helpful (P.Tr.1382-1383). Also, the jury could have concluded that appellant was trying to squeeze into smaller shoes at trial in a self-serving attempt to appear innocent. Moreover, the jury could have reasonably concluded that appellant's use of larger shoes during the murders was just one more attempt — in addition to the gloves and wig — to conceal his role in the crime.

## XI. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS RELATED TO JESSICA COX'S IMMUNITY.

Appellant claims the prosecutor committed misconduct in granting Cox immunity for her testimony (App.Br.125). He also claims counsel was ineffective for failing to object to the immunity agreement, and that appellate counsel was ineffective for failing to raise the issue on direct appeal (App.Br.125).

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

In denying these claims, the motion court stated that trial counsel was not ineffective because any objection would have been non-meritorious (inasmuch as the prosecutor has discretion to file charges), and that appellate counsel was not ineffective because there was no plain error (P.L.F.862).

Appellant's claim of prosecutorial misconduct is not properly before this Court. It was not alleged in the amended motion, and it is not cognizable. Trial-court error will only be considered in a Rule 29.15 motion where fundamental fairness requires, and then, only in rare and exceptional circumstances. State v. Carter, 955 S.W.2d 548, 555 (Mo. banc 1997). Here, movant failed to allege any rare or exceptional circumstances.

In any event, the prosecutor did not commit misconduct. Bargaining or plea bargaining with co-defendants or potential co-defendants is an integral part of the prosecutor's job. In exchange for testimony or guilty pleas, the prosecutor has discretion to dismiss or lessen charges or choose not file charges. See State v. Burson, 698 S.W.2d 557, 561 (Mo.App. E.D. 1985)(noting general rule that prosecutor's have discretion to charge). This bargaining power should not be confused with the limitation to the prosecutor's power discussed in State ex rel. Munn v. McKelvey, 733 S.W.2d 765 (Mo. banc 1987).

In that case, the prosecutor sought to compel a witness' testimony by unilaterally granting the witness immunity. Id. at 767. This Court held that the prosecutor lacked statutory or inherent authority to grant immunity to compel testimony in that manner. Id. at 768-769; but see id. at 769-770 (recognizing the "doctrine of equitable immunity," which serves to enforce immunity agreements that the prosecutor had no authority to grant); see also State v. Burson, 698 S.W.2d at 560 (one prosecutor can bind all prosecutor's in the state).

In appellant's case, the prosecutor did nothing more than bargain for Cox's testimony. Accordingly, appellant's case is not analogous to Munn, and counsel had no basis to object.

Furthermore, even if the prosecutor's agreement with Cox was made without authority — if Munn is broadly construed to preclude bargaining for testimony — there was still no misconduct. Applying Munn's rationale to appellant's case, it becomes apparent that Cox simply bargained for a nullity (which would nevertheless be enforced once she performed her part of the bargain). Thus, the immunity agreement was not an inducement "prohibited by law," which an attorney may not offer a witness under Rule 4-3.4(b); rather, it was an agreement not recognized by the law (until partially performed by the witness).

Additionally, when appellant's trial commenced in November 1998, the legislature had enacted §491.205, RSMo 2000 (effective August 28, 1997), which granted prosecutors authority to seek immunity for witnesses under certain circumstances. Of course, in this case, the prosecutor had not followed the procedure subsequently set out by statute. Thus, assuming the prosecutor had no authority to bargain, counsel could have objected.

However, it is apparent that counsel did not desire to object. To the contrary, while the prosecutor

did not initially elicit evidence that Cox had an immunity agreement, defense counsel did (T.Tr.1164,1180,1264). Defense counsel specifically elicited that Cox had obtained immunity before she ever spoke to law enforcement (T.Tr.1264-1265). And, as the dissent alluded to on direct appeal, this was undoubtedly an important aspect of counsel's attack upon Cox's credibility. See State v. Wolfe, 13 S.W.3d 248, 268 n.4 (Mo. banc 2000). Indeed, it has often been recognized that proof of an immunity agreement "impeaches the witness' credibility by showing an interest in testifying favorably for the government, regardless of the truth." See id. at 256.

And even if counsel simply failed to object due to oversight, there is no reasonable probability that the outcome of appellant's trial would have been different. As outlined above, just a few months after Cox gave her statement to law enforcement, the legislature granted prosecutors the statutory authority to seek immunity if:

> (1) [An] individual has refused or is likely to refuse to testify or provide other information on the basis of the individual's privilege against self-incrimination; and either:
>
> (2) The testimony or other information to be provided by such individual is necessary to the investigation or prosecution and is otherwise unobtainable; or
>
> (3) The testimony or other information to be provided by such individual is necessary for the prosecutor to prove a defendant's guilt beyond a reasonable doubt.

§491.205.2, RSMo 2000.

Here, there is no doubt that the prosecutor could have made such a showing if he had been compelled by an objection to follow the statutory procedure; thus, there is no reasonable probability that an objection would have altered the outcome of appellant's trial.

Neither was appellate counsel ineffective for failing to request plain error review of this claim on direct appeal. To prevail on such a claim, appellant would have had to show a manifest injustice resulting in a miscarriage of justice. However, in light of defense counsel's use of the immunity agreement to attack Cox's credibility, it is reasonably probable that this Court would have denied such a claim due to the overt possibility that the decision was one of trial strategy.

Moreover, there is no possibility that appellant suffered manifest injustice because, as this Court stated on direct appeal, the jury was fully apprised of the immunity agreement. State v. Wolfe, 13 S.W.3d at 256. Consequently, the facts relevant to impeaching Cox were fully disclosed, and "the jury could consider her credibility in light of the agreement." Id.

## XII. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIM THAT COUNSEL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO ASSERT VARIOUS OBJECTIONS TO HIS TAPED STATEMENT.

Appellant contends counsel was ineffective for failing to object to his taped statement to police (App.Br.130). He argues that the tape contained inadmissible evidence of prior bad acts and a prior arrest; that it was obtained in violation of his right to remain silent; and that it contained improper statements from the officers regarding his guilt, Cox's truthfulness, and his demeanor (App.Br.130-132). He also claims appellate counsel was ineffective for failing to assert error on direct appeal (App.Br.130).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Counsel's Strategy Included Using the Statement

In denying appellant's claims that counsel should have objected to the statement, the motion court found that the decision to use the statement was a matter of trial strategy, and that counsel had no meritorious basis to object or move to suppress (P.L.F. 891,909-910). Having found that counsel had a sound trial strategy, the motion court further held that there was no meritorious basis to challenge the admission of the statement on appeal (P.L.F.926).

Appellant does not address whether counsel's use of the tape was reasonable; rather, he simply asserts that "the problems with the audiotaped statement reveal it should have been suppressed" (App.Br.133). However, whether to file a motion to suppress was a matter of trial strategy. See State v.

Malone, 951 S.W.2d 725, 731-732 (Mo.App. W.D. 1997).

Here, counsel testified that an important aspect of the defense was using appellant's statement to establish his whereabouts (P.Tr.1437-1438). Counsel confirmed that she consciously decided to use the statement (P.Tr.1438). She wanted to use the statement because appellant was cooperative, did not invoke his rights, provided details about his alibi, and denied committing the murders (P.Tr.1438-1439). She "liked the statement" and did not want to suppress it (P.Tr.1440). This was a reasonable trial strategy; and even if appellant now thinks otherwise, "[i]t is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy." Clayton v. State, 63 S.W.3d 201, 207 (Mo. banc 2001).

**1. Prior drug use and arrest**

Nevertheless, appellant faults counsel for failing to object on various grounds. First, he argues that it contained inadmissible evidence of his prior drug use and prior arrest (App.Br.133). Counsel objected on these grounds at trial (T.Tr.722); thus, there is no reasonable probability that another objection would have altered the outcome of trial.[31]

In any event, the trial court properly admitted the statement. Appellant's drug use on the night in question, his involvement in the local "drug scene," and his dependency upon drugs were an integral part of the crime, and they corroborated Cox's account. See State v. Morrow, 968 S.W.2d 100, 107 (Mo.

[31] Whether this claim was waived for purposes of appellate review due to counsel's stating that she had no objection to the admission of the statement is irrelevant; as will be discussed, there was no meritorious basis to assert any claim on appeal.

banc 1998); State v. Roberts, 948 S.W.2d 577, 590 (Mo. banc 1997); State v. Bannister, 680 S.W.2d 141, 147 (Mo. banc 1984) (evidence of other crimes is admissible to complete the account of the murder).

Additionally, appellant's references to drugs and his prior arrest were an integral part of his statement. Without those references, appellant's alibi and account of his whereabouts would have been incomplete and misleading. With regard to his prior arrest, the arrest was only mentioned in passing — without any reference to what it was for. Thus, to the extent that it referred to improper evidence of other crimes, it was certainly harmless.

Moreover, appellant cannot claim prejudice. The arrest was undoubtedly based upon his traffic violations — evidence of which was admitted by the defense to show that appellant engaged in "normal" activities after the murders (T.Tr.1872-1873). And, if the arrest was for something else, appellant cannot claim prejudice because he admitted similar evidence of prior arrests. See State v. Holmes, 978 S.W.2d 440, 442 (Mo.App. E.D. 1998) ("A defendant cannot be prejudiced by admission of objectionable evidence if he offers similar evidence"). Thus, neither trial counsel nor appellate counsel was ineffective.

**2. Appellant's right to remain silent**

Appellant claims counsel should have objected to the statement because it was allegedly obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966) (App.Br.134-135). He points to various statements, e.g. "I'm through with this conversation" (P.Ex.MMM at 32), "That's all I've got to say about that" (P.Ex.MMM at 32,34-35,38), and "That's all I've got to say" (P.Ex.MMM at 51), as evidence that he invoked his right to remain silent.

After receipt of Miranda warnings, if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. State v. Simmons, 944

S.W.2d 165, 173 (Mo. banc 1997). A person has a right under the Fifth Amendment to cut off questioning and this right must be scrupulously honored. Id. The suspect, however, must give "a clear, consistent expression of a desire to remain silent" to invoke his rights adequately and cut off questioning. Id. at 173-174.

In appellant's case, there was no "clear, consistent expression of a desire to remain silent." When appellant said that he was "through with this conversation," it was in the midst of a larger statement. Appellant said:

> You know what, I'm through with this conversation, but I don't know what you, I haven't heard anything about it or done anything to anybody, and as far as a statement from somebody or something being with me when I done that, that's a goddamned lie. I'll tell you that, it's a lie. Because I haven't done that. That's all I've got to say about that.

(P.Ex.MMM at 32). Appellant repeatedly said that "all he had to say" about the murders was that he did not commit them; however, appellant never clearly, consistently expressed his desire to remain silent. In fact, he continued to speak freely.

Accordingly, even if counsel had not wanted to admit the statement for her own purposes, there was no meritorious basis to assert that this statement was taken in violation of appellant's right to remain silent. In addition, appellate counsel would have been hard pressed to challenge the admission of a statement that the defense was eager to admit.

**3. The officers' opinions**

Finally, appellant argues that counsel should have objected because the statement contained officers' opinions regarding his guilt, his "cool" demeanor, and Cox's truthfulness (App.Br.135). These

opinions, appellant asserts, were impermissible comments upon his credibility (App.Br.135).

The record shows that the jury was well apprised of what the officers were doing when they confronted appellant with evidence that they had supposedly gathered against him (T.Tr.1431-1432). Officer Schmidt testified that things he said in the interview about the evidence were untrue (T.Tr.1431-1432). On cross-examination, counsel again elicited that the officers' misstatements of fact and opinions about the evidence were just an interrogation technique (T.Tr.1440-1441). Consequently, there is no reason to believe that the jury was misled or that the officers opinions bolstered or corroborated Cox's story.

To the contrary, consistent with counsel's trial strategy, the statement was potentially striking evidence of appellant's innocence. His adamantine denials in the face of such accusations, and under the pressure of such interrogation tactics, were all the more powerful. In short, because the context of the officers' opinions was fully divulged to the jury, there was no meritorious basis to object or assert error on direct appeal.

Also, Officer Schmidt's comment that appellant was "cool" was not improper. Schmidt testified to this personal observation at trial, and the observation was a relevant fact for the jury to consider in weighing the statement.

Finally, appellant also notes that the tape was incomplete due to the officers' use of a voice-activated tape recorder (App.Br.130). This fact was explained to the jury, and Schmidt testified that no significant discussion was omitted (T.Tr.1394-1395,1429,1438). In addition, defense counsel ably used the omissions to suggest that the police were either engaged in shoddy police work or something more sinister (T.Tr.1438-1439,1444-1448). Counsel's actions did not fall below an objective standard of

reasonableness.

## XIII. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE OF OTHER CRIMES.

Appellant contends counsel was ineffective for (1) eliciting evidence that appellant's fingerprints were sent to the crime lab before Cox contacted law enforcement; (2) failing to object to photographs in the possession of law enforcement, evidence of appellant's having marijuana, evidence that appellant was trying to waste taxpayers' money, and evidence that Cox feared appellant would use his handcuffs on her; (3) failing to object to the prosecutor's closing argument that appellant had been driving an unregistered, unlicensed truck for two years; and (4) failing to preserve in the motion for new trial an objection to evidence that Cox feared appellant would use his handcuffs on her and rape her (App.Br.137).

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

### A. Appellant's Fingerprints and Photographs

Appellant claims counsel was ineffective for failing to object to evidence of his fingerprints and photographs, which, because they were in the possession of law enforcement, allegedly informed the jury of his "criminal history" (App.Br.137-138,140). In denying these claims, the motion court stated that appellant failed to show that the fingerprints and photographs were evidence of other crimes (P.L.F.864,889,904).

At trial, a defense witness, John Eidson testified that he compared appellant's known prints to latent

prints found in the victims' home (T.Tr.1824-1826). He testified that he did not match appellant's fingerprints to any of the latent prints found in the victims' home (T.Tr.1824-1826).[32] Counsel also elicited that appellant's fingerprints were submitted for comparison on February 25, 1997 (before appellant was arrested)(T.Tr.1824-1825).

Similarly, appellant argues that evidence of two photographs revealed his criminal history. First, Michael Schmidt testified that he obtained a photograph of appellant at the Sheriff's department and showed it to Jessica Cox, who identified it (T.Tr.1342). Second, on cross-examination, Van Purvis stated that he seized a red hooded sweatshirt because he "already" had a photograph of appellant wearing a red hooded sweatshirt (T.Tr.1790-1791).[33]

Defendants have the right to be tried only for the offense with which they are charged. State v. Hornbuckle, 769 S.W.2d 89, 96 (Mo. banc 1989). Evidence will run afoul of this rule only if it shows that the defendant has committed, been accused of, been convicted of or definitely associated with another crime or crimes. Id.

Here, the rule barring evidence of other crimes was not violated. Neither the fingerprints nor the photographs showed that appellant had committed or been associated with some other crime. The jury knew that the sweatshirt photograph was given to the police by appellant's employer. Also, the mere fact that "a police department has a photograph of a defendant in its files does not imply that the defendant has

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[32] This was an important aspect of the defense theory (T.Tr.1974).

[33] Purvis "already" had the photograph because it had just been given to him by appellant's employer (T.Tr.1786). Appellant's ownership of the red sweatshirt was important to the defense and was argued in closing (T.Tr.1974).

committed prior crimes." State v. Young, 943 S.W.2d 794, 798 (Mo.App. W.D. 1997); State v. Simmons, 939 S.W.2d 487, 489 (Mo.App. W.D. 1997). Also, "[f]ingerprint cards, in and of themselves, do not constitute evidence of a prior crime." State v. Morrow, 968 S.W.2d 100, 111 (Mo. banc 1998).

**B. Appellant's Marijuana and Disregard for the Taxpayers**

In denying these claims, the motion court stated that evidence of the marijuana-in-the-cereal-box story was fleeting, that the marijuana story was related to appellant's crimes and was not prejudicial, and that appellant's saying that he wanted to waste the taxpayers' money was related to his crimes and was not prejudicial (P.L.F.893-894).

Hileman explained how appellant confessed (T.Tr.1546-1549). He described how he and appellant "talked trash" about things they had done (T.Tr.1546). He mentioned a "kind of funny" story that appellant had told him about "some marijuana that had come up missing" (T.Tr.1546). Appellant said he found the marijuana when "his girlfriend poured him a bowl of cereal and it come flying out of the box of cereal into his bowl" (T.Tr.1546).[34] Hileman also said that appellant had talked to him about his impending trial (T.Tr.1547). Appellant told Hileman that he "had his lawyers filing a bunch of motions and stuff, trying to create a bunch of confusion" (T.Tr.1547-1548). The "idea," Hileman recounted, "was to file as many motions as possible . . . to waste taxpayers' money" (T.Tr.1548).

Appellant argues that Hileman's testimony was evidence of other crimes (App.Br.137-139). However, Hileman's testimony was a necessary prelude to the larger revelation that appellant confessed

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[34] Hileman indicated this discussion was related to the murder case (T.Tr.1546-1547). See discussion of Monica Clark's testimony in Point V.

to the murders. Absent preliminary admissions about less serious things, a sudden confession to the murders would have seemed strange and out of place. Cf. State v. Bannister, 680 S.W.2d 141, 147 (Mo. banc 1984) (evidence of other crimes is admissible to complete the account of the murder or to corroborate the defendant's confession).

Additionally, appellant's statement about wasting money was admissible to show consciousness of guilt. By admitting that he was trying to create confusion and waste money, he also admitted that he had nothing better, i.e., his innocence, to rely upon at trial.

And, even if the marijuana story was not admissible to give context to appellant's confession, its admission was harmless. Ample evidence of appellant's involvement with drugs was properly admitted at trial. Cox testified that appellant asked her whether she could get rid of a "lump sum" of drugs for him (T.Tr.1098). Appellant admitted in his taped statement that he used marijuana, and that fact was incorporated into the defense theory to explain what appellant and Cox had done on the night of the murders (T.Tr.1972-1973,2000). A conviction will not be reversed because of improper admission of testimony which is not prejudicial to defendant. State v. Evans, 992 S.W.2d 275, 290 (Mo.App. S.D. 1999). The defendant suffers no prejudice and cannot complain about the admission of evidence where similar evidence is properly admitted or admitted without objection. Id.

**C. Appellant's Handcuffs**

In his amended motion, appellant made two claims regarding the handcuffs. The first was that counsel was ineffective for failing to object to Cox's testimony that she was concerned that appellant would use the handcuffs on her (P.L.F.216). The second was that counsel was ineffective for failing to preserve, in the motion for new trial, an objection to Cox's testimony that she feared appellant would use the

handcuffs on her and rape her (P.L.F.220). Appellant now conflates the two and simply argues that counsel failed to object to Cox's testimony regarding the handcuffs *and* the rape (App.Br.137,139).

In denying appellant's claims, the motion court found that evidence of the handcuffs was relevant, was not evidence of uncharged misconduct, and was not prejudicial, and that evidence of Cox's apprehension of rape was relevant (P.L.F.882-883,888).

At trial, Cox testified that appellant took handcuffs out of his satchel (T.Tr.1110). When she asked what they were for, appellant said that he was not going to use them on her (T.Tr.1111). Cox later testified, over objection, that, in fact, she had been concerned that appellant was going to use the handcuffs on her and rape her (T.Tr.1307).

Neither of these instances showed that appellant committed some other crime; rather, the first simply showed that appellant had no intention of using the handcuffs on Cox, and the second simply revealed a fear that appellant would perhaps commit a rape. And, even if this testimony could be construed as evidence of other crimes, it was still admissible. Crimes that occur during the commission of the charged offense are admissible. See State v. Morrow, 968 S.W.2d 100, 107 (Mo. banc 1998); State v. Roberts, 948 S.W.2d 577, 590 (Mo. banc 1997). Appellant's exhibiting handcuffs was evidence of his intent to enlist Cox's aid through a tacit threat of violence. Additionally, inasmuch as Cox's aid was coerced, her fear of violence explained why she did not try to escape or prevent the murders.

**D. Appellant's Unlicensed Truck**

Finally, appellant claims that counsel unreasonably failed to object to the prosecutor's argument that he drove a "truck that ha[d]n't been licensed or registered for two years" (App.Br.137-140). This argument was inferred from evidence of two traffic tickets that the defense admitted into evidence

(T.Tr.1872). The tickets showed that, on October 28, 1996, appellant was cited with displaying another person's plates and for driving without a title (T.Tr.1872). Appellant paid the fines the day after the murders (T.Tr.1872).[35] That appellant was driving an unregistered truck to avoid detection was a reasonable inference from the fact that appellant had been cited with displaying another's plates and only paid the fines one day after the murders. It was not an improper reference to other crimes; and, even if it were, there is no reasonable probability that an objection would have changed the outcome of trial.

[35] Thus, when police later identified appellant by checking the truck's registration (T.Tr.1339-1341), appellant had already brought himself into compliance.

## XIV. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ASSERT THAT THE DEATH SENTENCES WERE DISPROPORTIONATE, AND THAT APPELLANT'S FIRST ATTORNEY HAD A CONFLICT OF INTEREST.

Appellant contends that appellate counsel was ineffective for failing to assert two claims on appeal, namely: (1) that the death sentences were disproportionate in view of the strength of the evidence, and (2) that appellant's first attorney, Dierdre O'Donnell, had a conflict of interest in representing appellant and, at a later date, Hileman (App.Br.142).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. The Strength of the Evidence

Appellant claims appellate counsel unreasonably failed to assert that the strength of the evidence was insufficient to support death sentences (App.Br.142). In denying this claim, the motion court found that, in light of this Court's decision on direct appeal, there was no reasonable probability that such a claim would have been successful (P.L.F.918).

Proportionality review is mandated by statute, §565.035.3, RSMo 2000, and this Court fulfilled its obligation to determine whether the sentence was disproportionate in view of the "strength of the evidence." See State v. Wolfe, 13 S.W.3d 248, 264-266 (Mo. banc 2000). There is no reasonable probability that this Court would have reached a different result had counsel pointed out alleged infirmities in the evidence. See id. at 264-266 (specifically distinguishing State v. Chaney, 967 S.W.2d 47 (Mo. banc

1998)).

### C. The Alleged Conflict of Interest

Appellant next claims that appellate counsel unreasonably failed to assert that appellant's first attorney, Dierdre O'Donnell, had a conflict of interest in representing appellant and, later, Hileman (App.Br.144). In denying this claim, the motion court found that counsel was not ineffective because, in light of the fact that appellant failed to show that there was a conflict, counsel did not overlook a meritorious claim (P.L.F.925-926).

Disagreeing with the motion court, appellant argues that O'Donnell had a conflict because, according to his view of the facts, after learning about Hileman's information, O'Donnell negotiated a deal for Hileman's testimony (App.Br.145). This misstates the facts. O'Donnell did not negotiate any deal that involved Hileman testifying against appellant; and, in addition, characterizing appellant as O'Donnell's former client overstates the relationship.

O'Donnell initially met with appellant for a "couple of hours" after he was detained (L.F.1-2;P.Ex.Ux6 at 9-10). He was then briefly represented by Ruth Schulte, who entered appearance on March 5, 1997 (L.F.2;P.Ex.Ux6 at 9-10). Schulte met with appellant about three times, but their visits were "relatively short" because she knew she would not be representing him (T.Tr.79). No one from her office talked to appellant about his case (T.Tr.79). Before the preliminary hearing, the case was transferred to the capital division, and, on March 18, 1997, appellant's trial attorneys entered appearances (L.F.2;T.Tr.97).

Several months later, near the end of 1997, O'Donnell represented Hileman on his various charges (T.Tr.79-80;P.Exs.Ux6,Vx6). On January 12, 1998, Hileman pled guilty to one charge and had his arson

charge dismissed (T.Tr.90;P.Exs.Ux6,Vx6). There was no agreement that Hileman would obtain information about appellant; rather, Hileman simply pled to a "term of years in prison" (P.Ux6 at 13). There is no evidence that, as part of that plea, Hileman agreed to testify against appellant (T.Tr.86-87,99;P.Ex.Ux6).

Before Hileman's plea, O'Donnell and Schulte met with the prosecutor and discussed Hileman's pending cases (T.Tr.83,86-88,95). Also, after Hileman's plea, Schulte met with the prosecutor and discussed Hileman's pending cases; however, they did not discuss any deals (Schulte was not Hileman's attorney and did not negotiate anything) (T.Tr.86,88-89,99-100). Similarly, O'Donnell testified that, while there may have been discussions, the pending cases were not disposed of during her representation of Hileman (P.Ex.Vx6).[36] In short, there was no evidence that O'Donnell negotiated an agreement for Hileman's testimony.

A day or two after the plea, O'Donnell conflicted out of Hileman's remaining cases (T.Tr.89-91,104;P.Ex.Ux6 at 6-7,9). Both O'Donnell and Schulte suspected there might be a conflict due to Hileman's possibly testifying against appellant (T.Tr.91-93;P.Ex.Ux6 at 8).[37] Hileman's new attorney, Kenneth Clayton, was expressly informed in February 1998, that Hileman had no deal for his testimony

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[36] Around the beginning of October 1998, Schulte talked to the prosecutor about Hileman's testifying against appellant, but that was long after her office had ceased to represent Hileman (T.Tr.89-90,92).

[37] The state informed O'Donnell that Hileman had indicated that he had information (P.Ex.Vx6 at 21). O'Donnell did not, as appellant asserts (App.Br.145), take Hileman's information to the state and then negotiate a deal.

(T.Tr.112). Clayton testified that he never negotiated any such deal (T.Tr.113-114). And Hileman never did get a deal. See Point III.

Thus, the record reveals that O'Donnell never represented appellant in any meaningful manner. She spent a couple of hours with him, and there is no evidence that she ever consulted with him about his case. Additionally, O'Donnell, out of an abundance of caution, conflicted out of Hileman's remaining cases (without negotiating a deal) when it became apparent that he could potentially testify against appellant (and potentially work out a deal).

Rule 4-1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Here, it stretches the facts to argue that appellant was O'Donnell's former client. However, even if appellant was a former client, O'Donnell did not represent Hileman in the same or a substantially related matter. Hileman's cases did not involve appellant, and they were not related to the murders. See State v. Smith, 32 S.W.3d 532, 542-543 (Mo. banc 2000) (relationship between cases was de minimus where prosecutor who previously represented the defendant subsequently prosecuted the defendant and used the previous criminal conviction as penalty-phase evidence).

Appellant argues Hileman's cases were substantially related because, in exchange for his testimony, Hileman had an agreement for favorable treatment. However, as discussed above, O'Donnell did not negotiate such an agreement, and Hileman never actually obtained such an agreement. Hileman's plea on January 12, 1998, involved nothing more than an agreement for a "term of years," and O'Donnell did not negotiate any deal in Hileman's remaining cases. In fact, O'Donnell recognized the potential conflict and withdrew before any deal was made. And, Hileman's new counsel, Kenneth Clayton, never obtained such a deal. Accordingly, there was no conflict that adversely affected appellant's case.

## XV. THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S CLAIMS REGARDING VICTIM-IMPACT STATEMENTS AND THE PRE-SENTENCE INVESTIGATION REPORT.

Appellant contends counsel was ineffective for failing to object to victim-impact statements that indicated the victims' desire for death sentences (App.Br.147). Appellant also claims the prosecutor engaged in misconduct by obtaining the victim-impact statements and making reference to them at sentencing (App.Br.147).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. There was Neither Prosecutorial Misconduct in Obtaining nor Improper Reliance Upon Victim-impact Statements

As appellant points out, before trial, the prosecutor obtained victim-impact statements (P.Ex.Kx7).[38] At some point, these statements were apparently made available to the pre-sentence investigation report author, who both interviewed victims and relied upon victim-impact statements (P.Ex.Jx7). Included in the victim-impact statements were opinions indicating a strong desire for death sentences (P.Exs.Jx7,Kx7).

At sentencing, the court noted that it had received the pre-sentence investigation report, and the

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[38] Contrary to appellant's claim, the prosecutor did not specifically seek opinions about the crime, appellant, or the appropriate punishment (P.Ex.Kx7).

court gave appellant an opportunity to note any inaccuracies contained therein (T.Tr.2161). Defense counsel then argued that life imprisonment would give "closure to the victims' family" (T.Tr.2163). In response, the prosecutor stated that "relative to closure," the victims had spoken for "themselves in the PSI, and those statements make it abundantly clear that they are in favor of a punishment of death" (T.Tr.2165).

Appellant now claims that the prosecutor improperly obtained and referenced the victim-impact statements, and that counsel unreasonably failed to object (App.Br.147). In denying these claims, the motion court stated that appellant failed to prove this claim, that the jury did not see any improper victim-impact statements, that the judge only considered proper evidence in imposing sentence, and that the prosecutor properly obtained victim-impact statements (P.L.F.930-931).

The prosecutor's obtaining victim-impact statements was proper. Victims have a state constitutional right to be heard, Art. I, § 32, Mo. Const. (as adopted 1992), and the prosecutor is entitled to investigate victim-impact evidence in preparing for penalty phase. §565.040.4, RSMo 2000. Admittedly, a victim's desire for a death sentence should not be considered by the judge. State v. Smith, 32 S.W.2d 532, 555 (Mo. banc 2000).

Here, the prosecutor did "speak for the victims' family" and reiterate their desire for death sentences, but he was simply replying to defense counsel's mischaracterization of the victims' wishes. The judge was previously aware of the victims' desires, but judges are presumed not to consider improper evidence during sentencing; thus, there is no reason to believe that the trial court considered those opinions in sentencing appellant. See id.

In fact, the record reflects that the judge sentenced appellant based upon a careful evaluation of appellant's background, the crime, and the evidence presented at trial (T.Tr.2165-2168). The court was

not improperly influenced, and there is no reasonable probability that the outcome would have been different had counsel objected. See id. (despite overruling counsel's objection to victims' opinions that the defendant deserved death, the court's oral pronouncement of sentence showed that the court had only considered proper facts and circumstances).

## XVI. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND CALL KEITH EICHINGER AND LOIS PATTON.

Appellant contends that counsel was ineffective for failing to present additional mitigating evidence of his good conduct in jail and of his difficult childhood (App.Br.150).

### A. Standard of Review

Review is for clear error. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). Appellant has the burden of proving his claims by a preponderance. Rule 29.15(i).

### B. Counsel Adequately Presented Mitigation Evidence

To prevail on a claim of ineffective assistance, appellant must show that counsel's performance was deficient, and that he was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 694 (1984).

In preparing for penalty phase, counsel, with the assistance of a "mitigation specialist," reviewed "some thousand pages" of discovery; talked with appellant on 20-25 occasions; tried to follow-up on every "fruitful" piece of information appellant gave them; obtained appellant's "DOC records" and various other records; and interviewed and/or deposed numerous potential witnesses, including family members, a former fiancee, appellant's former juvenile officer, and an expert in the area of prison adjustment and offender classification (P.Tr.727-729,732,735-736). Counsel devised a two-fold strategy:

> [1] to try and explain to the jury, based on his home life, how it was that he came to basically be living on the streets at a fairly young age and getting into trouble, and how that just continued into his adulthood; but [2] that in a setting such as the Department of Corrections, he functioned very well and that he could do well in prison.

(P.Tr.737).

Pursuing this strategy, counsel called Leroy Maxwell, appellant's former juvenile officer; Brenda Kerns, appellant's sister; and James Aiken, an expert in the area of prison adjustment and offender classification (T.Tr.2063,2073,2088). Maxwell testified about appellant's repeated commitments to the Buchanan County Boys Home, beginning at the age of 10; his unstable home life, including the lack of paternal care and maternal "feeling;" and his eventual commitment to the training school at Boonville Correctional Center (T.Tr.2066-2070). Kerns testified about appellant's difficult childhood, including appellant's estrangement from their stepmother (who often screamed at appellant and said she was glad he was not her child); the family's poor circumstances (e.g. getting kicked out of homes for failing to pay rent, having no utilities or bathrooms, the paucity of food); their mother's abuse (e.g. throwing spatulas, hot pans of grease, and knives and other violent acts); their father's alcoholism and tendency to spend his time away from home in bars; appellant's tendency to take the brunt of their mother's abuse, due, in part, to his attempts to protect the other children; and appellant's leaving the home when he was nine years old (T.Tr.2073-2084). And, finally, Aiken testified that appellant came from "very unfortunate circumstances," including poverty, neglect, substance abuse, a dysfunctional family, and community ostracization (T.Tr.2093). Aiken also testified that appellant had adjusted "very well" to prison, that appellant was not violent, that appellant would never be released from maximum security, that appellant would adjust well to prison and not pose any unusual threat to safety, and that appellant's work history in prison was "outstanding" (T.Tr.2093-2098,2109).[39]

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[39] Counsel was prepared to call appellant's brother, Steven Wolfe, but after appellant's sister testified, appellant told his counsel that he did not want "any more of this type of evidence" presented

As is readily apparent, counsel made reasonable efforts to investigate and gather mitigation evidence. Counsel also developed and implemented a reasonable penalty-phase strategy. Compare Williams v. Taylor, 529 U.S. 362 (2000). Despite these efforts, appellant now claims counsel was ineffective for failing to investigate and call Keith Eichinger, who would have testified about his good behavior in the Camden County Jail, and Lois Patton, who would have testified about appellant's difficult childhood (App.Br.150).

In denying these claims, the motion court stated that witness selection was a matter of trial strategy, that Lois Patton was not known to counsel and would have been cumulative, that the testimony of Keith Eichinger was cumulative, that counsel followed a reasonable strategy, and that appellant was not prejudiced (P.L.F.912-913,915-916).

**1. Keith Eichinger**

At the evidentiary hearing, counsel acknowledged that she had deposed Eichinger prior to trial and obtained deposition testimony regarding appellant's good behavior while in the Camden County Jail (P.Tr.671). She decided not to call Eichinger, however, because she did not think that he would jeopardize his job to aid appellant (P.Tr.671-672). This strategic decision, made after thorough investigation, is virtually unchallengeable. Lyons v. State,39 S.W.3d 32,39 (Mo.banc 2001).

Here, counsel fully investigated Eichinger's testimony and chose not to call him due to a belief that he would not jeopardize his job to aid appellant. Counsel's decision was reasonable because it would have been decidedly unhelpful to call a reluctant or hostile witness during penalty phase. Appellant did not

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(T.Tr.2084). Appellant assured the trial court that counsel was following his wishes (T.Tr.2087).

inquire about the basis for counsel's belief; thus, appellant failed to overcome the presumption that counsel acted reasonably.

Citing Eichinger's post-conviction testimony that he would have "obeyed [the] subpoena," appellant argues that Eichinger was willing to testify (P.Ex.N at 14-15). However, "obeying" a subpoena does not indicate willingness, and a lack of willingness was precisely what bothered counsel. Furthermore, Eichinger's reluctance to testify was strong. With regard to testifying at the evidentiary hearing, he stated: "Don't subpoena me to that court hearing; I will not go. You can throw me in jail; I'm not going" (P.Ex.N at 25). This was ostensibly due to his health (which apparently would not suffer in jail).

Additionally, appellant was not prejudiced. Aiken testified that appellant had adjusted well to incarceration, that appellant had an outstanding prison work history, and that appellant would adjust well to life imprisonment (T.Tr.2093-2098,2109). Thus, Eichinger's testimony was essentially cumulative to Aiken's testimony; and counsel was not ineffective for failing to present it.[40] Middleton v. State, 80 S.W.3d 799, 810 (Mo. banc 2002) (counsel reasonably chose not to present cumulative evidence of good prison behavior).

To the extent that Eichinger's testimony was not entirely cumulative, there is no reasonable probability that it would have affected the outcome of appellant's trial. While Eichinger was not a paid expert (and could not be impeached with financial interest), Aiken's expertise and experience with maximum security prisons made his testimony that much more relevant. Furthermore, the state only slightly

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[40] Notably, the jury heard evidence that appellant was a trustee at the Camden County Jail (T.Tr.1627).

contested whether appellant would adjust well in prison (T.Tr.2134). Instead, the state argued that appellant's ability to adjust was simply another reason to give him a harsher sentence (T.Tr.2134).

And, finally, Eichinger's testimony was not very favorable. He said that appellant had behaved well and performed his job well; however, he testified that appellant had only worked under constant, "very close supervision" due to appellant's being a "very dangerous" inmate (P.Ex.N at 19-20). Such testimony would have made no difference.

**2. Lois Patton**

To claim ineffective assistance for failing to call a witness, appellant must prove that the witness was either known to his attorneys or that the witness could have been found after reasonable investigation. See State v. Jones, 979 S.W.2d 171, 186 (Mo. banc 1998). Here, counsel admitted that appellant's mother mentioned a "Lois" in Arizona (P.Tr.669).

Tellingly, there is no evidence that counsel knew the substance of Lois' testimony or the nature of Lois' relationship with appellant. Absent such information, counsel had no reason to attempt to contact "Lois" in Arizona. Middleton v. State, 80 S.W.3d at 810-811.

Even if counsel had been apprised of Lois' knowledge, appellant was not prejudiced by counsel's decision not to investigate her. Counsel conducted an extensive investigation of appellant's troubled childhood and found a significant amount of pertinent evidence. Counsel's efforts were reasonable, and she cannot be faulted for failing to investigate one more witness who had the same information. Moreover, counsel presented substantial evidence of appellant's difficult childhood. Thus, Patton's testimony was

cumulative, and counsel was not ineffective for failing to present it. Id. at 810.[41]

[41] Additionally, appellant would not have wanted Lois to testify. As noted above, after his sister testified about the details of his childhood, appellant told his counsel not to put on "any more of this type of evidence" (T.Tr.2084). Appellant should not now be heard to say that counsel was ineffective for failing to put on "more of this type of evidence."

## CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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# APPENDIX

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and the appendix, contains 27,430 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of December to:

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